PS LA 2008/15 - Taxpayer Alerts

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Australian Government
Australian Taxation Office

Practice Statement Law Administration

PS LA 2008/15

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.

SUBJECT: **Taxpayer Alerts**

PURPOSE: **To provide guidance for initiating and issuing a Taxpayer Alert**

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BACKGROUND

1. This practice statement replaces Law Administration Practice Statement PS LA 2005/13 *Taxpayer Alerts*. The referral processes for Aggressive Tax Planning matters contained in this practice statement, together with those in Law Administration Practice Statements PS LA 2008/7 *Application of the promoter penalty laws (Division 290 of Schedule 1 to the Taxation Administration Act 1953) to promotion of tax exploitation schemes* and PS LA 2008/8 *Application of the promoter penalty laws (Division 290 of Schedule 1 to the Taxation Administration Act 1953) to schemes involving product rulings*; replace those in Law Administration Practice Statement PS LA 2005/25 *Aggressive tax planning end-to-end process*. As a result, PS LA 2005/25 has been withdrawn.

2. In this practice statement:

   - a reference to 'tax' includes 'excise duty', and
   - a reference to 'taxpayers' includes 'trustees of self managed superannuation funds' (SMSFs).

3. A Taxpayer Alert is a warning to the community about an activity that is causing us concern. It is based on intelligence of what is happening in the market and alerts the community about an issue, where we believe taxpayers may not be complying with the law. Taxpayer Alerts target significant and emerging aggressive tax planning and superannuation arrangements that the ATO has under risk assessment, as well as recurrences of arrangements that have previously been risk assessed.

4. 'Aggressive tax planning' is tax planning that goes beyond the policy intent of the law and involves deliberate approaches to avoid any type of tax, superannuation obligation or excise duty. It undermines the integrity of the revenue system and community confidence in the fairness and equity of that system. Aggressive tax planning activity may be found in all market segments, but the types of activity vary across the segments.

5. Taxpayer Alerts are published under the Commissioner's powers of general administration including:

   - section 8 of the *Income Tax Assessment Act 1936*
   - section 3 of the *Fringe Benefits Tax Assessment Act 1986*
   - paragraphs 6(1)(e), 6(1)(f) and 6(1)(g) of the *Superannuation Industry (Supervision) Act 1993*
   - section 43 of the *Superannuation Guarantee (Administration) Act 1992*
   - section 30 of the *Superannuation Contributions Tax (Assessment and Collection) Act 1997*
   - section 3A of the *Taxation Administration Act 1953* (TAA)
   - section 356-5 of Schedule 1 to the TAA, and
   - section 7 of the *Excise Act 1901*.

STATEMENT

6. Taxpayer Alerts provide information that is in the interests of an open tax administration to taxpayers. Taxpayer Alerts also give early warning to trustees of SMSFs regarding superannuation regulatory concerns that may put members' superannuation benefits at risk.

7. Taxpayer Alerts are written principally for taxpayers and their advisers and also serve to inform ATO personnel of new and emerging higher risk tax planning and superannuation issues.

8. Taxpayer Alerts must give the title of the arrangement, briefly describe the arrangement and highlight the features about which the ATO has concerns. These features will generally require more detailed analysis to determine whether and to what extent it is necessary to provide taxpayers with ATO views in a published form, such as by public rulings, or to explain relevant administrative approaches by practice statement.

9. In publishing a Taxpayer Alert, the ATO is seeking to assist taxpayers who have entered into an arrangement, or who may be contemplating entering into an arrangement, to make informed decisions about their tax affairs. Those taxpayers can seek the ATO's advice in respect of their particular circumstances through a private ruling (noting that the TAA sets out circumstances where the Commissioner may decline to issue such a ruling).[1] However, a private ruling cannot be given regarding superannuation regulatory issues.[2]

10. Taxpayers, and those seeking advice on superannuation regulatory issues, may also seek independent advice from tax or legal professionals not associated with the arrangement. They may also contact the contact officer named in the Taxpayer Alert.

11. Not all potential tax planning issues that the ATO has under risk assessment or encounters will be the subject of a Taxpayer Alert. The absence of a Taxpayer Alert on an arrangement does not mean that the ATO accepts or in any way endorses that arrangement, or the tax consequences promoted. The ATO will not publish separate Taxpayer Alerts to describe each variation or adaptation of an arrangement, some form of which is the subject of a Taxpayer Alert. Further, some arrangements that are the subject of a Taxpayer Alert may, on further examination, be found not to be of concern to the ATO. In these latter cases the Taxpayer Alert will be withdrawn (see paragraphs 35 to 37 of this practice statement) and a notification published, which will be referenced to that Taxpayer Alert.

12. In deciding to publish a Taxpayer Alert, the ATO must strike a balance between the desirability of providing an early warning to taxpayers and the legal, administrative and commercial risks which may arise following the publication of a Taxpayer Alert.

[1] Refer to section 359-35 of Schedule 1 to the TAA and Taxation Ruling TR 2006/11 *Private Rulings*.
[2] Refer to section 357-55 of Schedule 1 to the TAA and TR 2006/11.

13. Taxpayer Alerts are excluded from Law Administration Practice Statement PS LA 2008/3 *Provision of advice and guidance by the ATO*. However, where a Taxpayer Alert provides guidance that a particular arrangement is or will be ineffective, that guidance will be given the same level of protection as is given to guidance in publications that are included in PS LA 2008/3. If the guidance in a Taxpayer Alert is subsequently found to be incorrect and the taxpayer relied on that guidance, the taxpayer is protected from paying a shortfall penalty and any interest charge that would otherwise be payable under the law.

Identification of an aggressive tax planning arrangement

14. Where ATO personnel or an area of the ATO identifies a tax planning arrangement which may constitute aggressive tax planning, it is **mandatory** to escalate the issue for consideration as to whether a Taxpayer Alert should be published. Examples of features of tax planning arrangements that may warrant the publication of a Taxpayer Alert are outlined in paragraph 27 of this practice statement.

Process to issue a Taxpayer Alert

15. Where a business line (the compliance risk owner) identifies an arrangement that may be suitable for a Taxpayer Alert as part of a wider compliance strategy for managing a risk, it should advise the Aggressive Tax Planning business line (ATP BSL) immediately via the *ATP BSL Referral Template*. In the case of Indirect Tax (ITX) arrangements, the *ITX ATP Referral Email* is to be completed.[3] Staff requiring advice or information about the Taxpayer Alert program, including guidance whether to refer a matter to ATP BSL, should contact ATP BSL via the contact points on the ATO intranet.

16. ATP BSL, in conjunction with the compliance risk owner and other stakeholders, will determine whether and when a Taxpayer Alert should issue as part of the overall compliance mitigation strategy to address the risk.

17. If it is proposed to publish a Taxpayer Alert, ATP BSL, in conjunction with the compliance risk owner, will identify and consult with the relevant internal ATO stakeholders likely to be affected by the publication of the Taxpayer Alert. Given the level of reputational risk involved in the issuing of Taxpayer Alerts, tax technical officers in Law and Practice must be engaged to provide technical input.[4]

18. ATP BSL will develop a stakeholder management plan to ensure that ATO personnel are informed of the tax planning arrangement.

19. ATP BSL will then prepare a submission, in conjunction with the compliance risk owner, tax technical officers in Law and Practice and any other stakeholders, to support the publication of the Taxpayer Alert. The submission will include:

    - a description of the arrangement
    - the revenue at risk, where quantifiable, and
    - the numbers of taxpayers the arrangement may involve.

[3] Both referrals are ATO internal documents, not available externally. ATO staff can access these documents through hyperlinks in the Other References section at the end of this practice statement.

[4] For more guidance on when Law and Practice should be engaged, see PS LA 2012/1 *Management of high risk technical issues and engagement of tax technical officers in Law and Practice*.

20. The submission to publish the Taxpayer Alert must expressly assess:

- any potential legal risks arising
- any relevant previous or current consideration by the ATO of the arrangement, and
- any potential commercial impact of publishing the Taxpayer Alert on those promoting the arrangement it describes, or on others employing or associated with that arrangement.

21. The documentation supporting the submission must also consider the application of Division 290 of Schedule 1 to the TAA (promoter penalty laws) to entities marketing the arrangement and a compliance mitigation strategy for current or potential participants.

22. Further detail about the process recommended for issuing a Taxpayer Alert is outlined in the *Taxpayer Alert Procedures*.[5]

Approval of the Taxpayer Alert

23. The Taxpayer Alert is to be reviewed by the relevant compliance risk owner and. all Taxpayer Alerts must be technically cleared by tax technical officers in Law and Practice.

24. Once technically cleared, the Taxpayer Alert is to be reviewed by the Assistant Commissioner, Technical Leadership in ATP BSL. Once satisfied with its content, the Assistant Commissioner will refer the Taxpayer Alert to the Deputy Commissioner of ATP BSL. Once satisfied with its content, the Deputy Commissioner will then refer the Taxpayer Alert to the Second Commissioner Compliance. Once satisfied with its content, the Second Commissioner Compliance will then refer the Taxpayer Alert to the Commissioner. The Commissioner will decide whether the Taxpayer Alert should be published.

High risk technical issues

25. Where a Taxpayer Alert is issued as part of the mitigation strategy of a high risk technical issue,[6] the technical issues identified by the Taxpayer Alert must continue to be managed appropriately in accordance with PS LA 2012/1. The technical issues may be resolved by stating the ATO view in a ruling, determination, ATO Interpretative Decision or in another interpretative product.

EXPLANATION

26. Taxpayer Alerts are not limited to arrangements or concerns involving aggressive tax planning. Taxpayer Alerts may also be issued in relation to arrangements which, at the lower end of the scale, may fall short of aggressive tax planning, or at the higher end of the scale may constitute fraud.

[5] This is an ATO internal document, not available externally. ATO staff can access the *Taxpayer Alert Procedures* through a hyperlink in the Other References section at the end of this practice statement.

[6] For more guidance on High risk technical issues and their management, see PS LA 2012/1.

27. Examples of features of tax planning arrangements that may warrant the publication of a Taxpayer Alert include:

- improper creation or inflation of deductions, increasing credits or offsets, reduction or deferral of income or capital gains and circumvention of withholding tax
- suppression or deliberate understatement of income
- contrivance and artificiality in the method of execution
- little or no real underlying business activity or purpose
- an economic return is only available because of the tax benefit claimed under the arrangement
- complete or substantial removal of any risk to a taxpayer
- limited or non-recourse financing associated with a round-robin flow of funds
- little cash outlay associated with borrowing of funds under a capitalising debt facility
- a mechanism for winding up or exiting an arrangement, before net income is generated for an investor
- assumptions, including 'blue sky' projections, that can lead to seemingly excessive valuations of assets for example, resulting in inflated deduction claims
- use of tax-exempt entities, especially charities, to wash income
- transactions involving secrecy havens
- use of superannuation funds for purposes other than superannuation benefits
- interposed entities which have no substantial commercial rationale except to create a tax benefit, and
- transactions which do not appear to be legitimate business dealings.

28. Taxpayer Alerts do not provide the ATO view on the arrangements they describe or on tax technical or tax administrative issues arising from those arrangements. Most Taxpayer Alerts address situations where there is no ATO view and where we seek to provide the ATO view. The timing of the issue of the ATO view will be influenced by whether we need to gather more information about the facts, the complexity of the issue and whether a general anti-avoidance provision applies.

29. With some Taxpayer Alerts there may be an established ATO view and the Taxpayer Alert is being issued because the ATO has information that indicates a need to take immediate action to deter promotion or renewed promotion of arrangements. The ATO may also issue Taxpayer Alerts where the ATO has a view that an arrangement is clearly ineffective, such as where evasion is involved. An ATO view is not needed to explain our view on these arrangements.

Supporting materials to be prepared

30. ATP BSL, in conjunction with the compliance risk owner, will in addition to preparing the submission for the Taxpayer Alert and the Taxpayer Alert, prepare a briefing and communication package to accompany the release of the Taxpayer Alert.

31. This package will include the:

- Request for Law engagement where relevant
- Media Release
- Minute to the Assistant Treasurer
- Question Time Brief
- Client Contact Centre Script, Telephony Clearance and Procedures, and
- Media Briefing.

32. A diagrammatic representation of the Taxpayer Alert process is shown at Attachment 1 of this practice statement.

Submission to publish a Taxpayer Alert

33. The submission includes an executive summary that gives a brief introductory description of the arrangement, the revenue at risk and the contact officer's details.

34. The submission supporting the publication of the Taxpayer Alert will cover these points:

- the reason for the Taxpayer Alert and how the arrangement was identified – including features of the arrangement that indicate that a Taxpayer Alert is warranted, revenue at risk and the number of taxpayers involved
- any potential legal risks arising, including the potential for criminal liability, claims for compensation, judicial review of future ATO decisions and that the failure to publish a Taxpayer Alert may be used to support a 'reasonably arguable position' on the scheme
- previous or current consideration by the ATO of the arrangement including any current or proposed compliance activity
- commercial impact – the potential commercial impact of the publication of the Taxpayer Alert on the relevant promoter's business and/or on the business of others associated with the arrangement
- marketers, advisers and participants
- outline of the arrangement – explanation of the mechanics of the scheme including legislative background/references
- preliminary tax issues – legislative argument/s as to why the arrangement may not be reasonably available at law
- compliance mitigation strategies including ATO view clarification, communication strategies and appropriate compliance activities for current participants, and
- potential application of Division 290 of Schedule 1 to the TAA (promoter penalty laws) to entities involved in marketing or facilitating marketing of the arrangements.

Alteration or withdrawal of a Taxpayer Alert

35. The publication of a Taxpayer Alert is principally intended to ensure that taxpayers and their advisers are informed that the arrangement described is under risk assessment by the ATO. The subsequent publication of ATO views in respect of a published Taxpayer Alert ensures that taxpayers and their advisers are further informed of the ATO's position on relevant issues for that arrangement.

36. Situations may arise where the earlier decision to issue a Taxpayer Alert is affected by legislative amendment, a court decision or new facts emerging that reveal the arrangement is not one involving any technical or administrative risk.

37. Where a published Taxpayer Alert is required to be altered or withdrawn, ATP BSL, in conjunction with the compliance risk owner will undertake the appropriate steps necessary for this process, taking account of the *Taxpayer Alert Procedures*.

Amendment history

Date of amendment	Part	Comment
27 June 2013	Generally	Updated to current corporate publication style.
	Contact details	Updated.
28 June 2012	Throughout	Updated to reflect the issue of PS LA 2012/1 and the withdrawal of PS LA 2003/10.
15 November 2011	Contact details	Updated
17 June 2011	Generally	Update contact details and styles.
	Paragraph 3	Update description of Taxpayer Alert.
	Paragraph 16	Update GST to ITX.
	Paragraph 17 to 20	Simplify wording.
	Paragraph 25	Included reference to Second Commissioner of Compliance.
	Paragraph 29 to 31	Simplify wording.
	Paragraph 35	Include ATO view clarification.
	Attachment A	Attachment renumbered to Attachment 1 and diagram updated.
9 November 2010	Contact details & style update	Contact details updated & reference to Tax Office changed to ATO.
31 May 2010	Contact details	Updated.

Subject references	Aggressive tax planning Taxpayer Alerts High risk technical issues Risk analysis and management Taxpayer Alerts – alteration and withdrawal Taxpayer Alerts – preparation, approval and publication
Legislative references	Excise Act 1901 7 FBTAA 1986 3 ITAA 1936 8 SGAA 1992 43 SISA 1993 6(1)(e) SISA 1993 6(1)(f) SISA 1993 6(1)(g) Superannuation Contributions Tax (Assessment and Collection) Act 1997 30 TAA 1953 Sch 1 Div 290 TAA 1953 3A TAA 1953 Sch 1 356-5 TAA 1953 359-35 TAA 1953 357-55
Related public rulings	TR 2006/11
Related practice statements	PS LA 1998/1 PS LA 2005/13 PS LA 2005/25 PS LA 2008/3 PS LA 2008/7 PS LA 2008/8 PS LA 2012/1
Other references	ATP BSL Referral (internal link only) ITX ATP Referral Email (internal link only) Taxpayer Alert Procedures (internal link only)
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Taxpayer Alert Process

