PS LA 2008/4 - Publication of edited versions of written binding advice

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PS LA 2008/4
Publication of edited versions of written binding advice

This practice statement provides guidance on preparing and publishing edited versions.

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

This practice statement sets out the policy in relation to preparing and publishing edited versions.

To improve the integrity of our advice processes, the ATO publishes edited versions of all written binding advice.

The forms of written binding advice for which edited versions are published are:

- private rulings issued under Division 359 of Schedule 1 to the *Taxation Administration Act 1953* (TAA)
- administratively binding advice issued to specific taxpayers.

We publish edited versions of written binding advice internally on the ATOlaw system and externally on the Legal database.

2. Can taxpayers rely on edited versions?

No. The edited versions published to the Legal database provide a public historical record of all edited written binding advice we issue by the ATO.[1]

We are not bound by an edited version, in relation to any taxpayer. Importantly, an edited version:

- is not intended to provide a taxpayer with advice or guidance
- is not a publication approved in writing by the Commissioner
- does not set out a general administrative practice of the ATO.

Therefore, a taxpayer that relies on information contained in an edited version which is incorrect or misleading is not protected from:

- tax that would otherwise be payable or repaying an otherwise overpaid entitlement
- interest
- penalty.

It is only the written binding advice that is provided to the taxpayer (from which the edited version is created) that is binding on the Commissioner, and only for the taxpayer to whom it applies.

3. The roles in the edited version process

Case officers and authorising officers

Case officers and authorising officers must ensure that:

- the relevant precedential ATO view is correctly applied or created when the written binding advice is prepared, and that it is technically correct
- the steps outlined in Attachment A of this practice statement are followed in regard to the editing process
- the ATO Style Guide and the ATO standards for citations and references are applied when drafting the edited version.

It is the authorising officer who has the ultimate responsibility for the decision and quality of the edited version issued.

Law publishing and policy team

The Law publishing and policy team (part of the Public Advice and Guidance (PAG) Centre in the Tax Counsel Network (TCN) business line) publish the edited version to ATOlaw and the Legal database. During the publication process, the publishers will

[1] Edited versions have been published in response to applications received after 31 March 2001, or 30 June 2001 in respect of GST specific private rulings. However, edited versions over 15 years old are routinely removed from the Legal database.

further review the content of the edited version (as prepared by the case officers and authorising officers) to ensure that confidentiality and privacy concerns are addressed.

The Law publishing and policy team is also responsible for resolving comments received on the edited version following its issue to the taxpayer (see section 6 of this Practice statement).

4. What needs to be taken into account when creating an edited version?

The overall objective of the editing process is to prepare a version of the written binding advice that accurately reflects that advice and is suitable for publication.

Editing officers must follow a four step approach in performing the editing process (refer to Attachment A).

Taxation laws, primarily Division 355 of Schedule 1 to the TAA, impose a number of confidentiality obligations on ATO personnel. Further obligations to protect the privacy of individual taxpayers are imposed by the *Privacy Act 1988* (Privacy Act). Editing officers must thus take particular care when preparing an edited version to ensure there is no interference with the privacy of an individual and that protected information is not disclosed.

The case officer must consider all submissions on privacy or confidentiality grounds about the content of the edited version made by the taxpayer at the time of their request for written binding advice. The case officer must document the reasons for not agreeing with any of the taxpayer's submissions.

5. What is a summary edited version and when is it used?

In exceptional cases, it may not be possible to accurately reflect the facts without identifying the parties. A summary of the advice in general terms (referred to as a summary edited version) must be prepared in these instances. Summary edited versions are comprised only of the advice's questions and answers or, in rare cases, a brief statement (such as 'the Commissioner has ruled on each of the questions'). Privacy and/or commercial-in-confidence issues are the only reasons for the preparation of a summary edited version.

6. What is the process for comments and review?

The case officer must send the authorised edited version to the taxpayer for comment at the same time as the written binding advice is issued.

If the taxpayer does not provide comments about the edited version within 28 days from the issue date of the written binding advice, the edited version will be published to ATOlaw and the Legal database.

If the taxpayer does provide comments relating to privacy or confidentiality matters, these comments will be considered by the Law publishing team. They may liaise with the case officer and authorising officer when resolving substantive issues raised by a taxpayer.

7. Are edited versions updated?

Documents published to ATOlaw and the Legal database are intended to be a public historical record only. They are not updated to reflect:

- changes in the law, or
- changes in our application of the law.

However, an edited version may be annotated where:

- the underlying written binding advice is revised
- the original written binding advice is overturned during review processes, or
- the edited version is found to be incorrect or misleading, and represents a risk in regard to incorrect use.

8. More Information

This Practice statement should be read in conjunction with Law Administration Practice Statement PS LA 2008/3 *Provision of advice and guidance by the ATO*.

For assistance or queries regarding the edited versions process, email the Law publishing and policy team.

See also:

- ATO style guide (internal link only)
- ATO standards for citations and references (internal link only)
- Edited versions on ATOlaw (internal link only)
- Edited versions on the Legal database

Date issued 28 February 2008

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Attachment A

1. General requirements when editing written binding advice

The overall objective of the editing process is to prepare a version of the written binding advice that accurately reflects that advice and is suitable for publication.

Where possible, edited versions should be written in as gender neutral a tone as possible, using pronouns such as 'they' or 'their' in place of 'she' or 'him'. Words such as 'spouse', 'child', 'sibling' or 'relative' should be used rather than 'husband' or 'brother'.

2. Privacy requirements when editing written binding advice

Editing officers must remove or replace certain personal information which is protected from release under the Privacy Act. Personal information is defined in subsection 6(1) of the Privacy Act to mean 'information or an opinion (including information or an opinion forming part of a database), whether true or not, and whether recorded in material form or not, about an individual whose identity is apparent, or can reasonably be ascertained, from the information or opinion'.

Examples of personal information which may fall under this category include:

- adoption of a child
- details of a divorce
- medical treatment
- political associations
- taxpayers engaged in income producing activities which may carry a social stigma.

Where the advice turns on information that may reveal a taxpayer's identity or breach their confidence, it must be replaced with more general terms (and must not be replaced with false statements), which ensure that the edited version is comprehensible and accurately reflects the written binding advice.

Editing officers must remove or replace individual facts that in isolation may not identify a taxpayer but which, when combined with other information, may allow the identity of the taxpayer to be ascertained.

3. Questions to consider when editing written binding advice

Editing officers must consider three questions when editing written binding advice:

- would a person reading the edited version be able to identify the taxpayer, or any third party[2] who is not excepted? (general public test)
- would a knowledgeable person[3] reading the edited version be able to identify the taxpayer or any third party who is not excepted? (knowledgeable person)
- would a person within a community[4] reading the edited version be able to identify the taxpayer or any third party who is not excepted? (significant community test).

These tests are dependent on the facts of each case and the making of a judgment by editing officers. The ability to identify a taxpayer or third party who is not excepted is more likely in complex arrangements or transactions, or where the particular industry is highly specialised.

4. Four step approach to the editing process

Editing officers must follow a four step approach in performing the editing process.

The examples given in the following four step approach are not intended to be exhaustive. The publishing team in the PAG Centre can provide assistance in regard to the editing process.

Step 1: remove information that specifically identifies the taxpayer

This requires editing officers to ensure that the edited version does not contain any primary identifying details of a taxpayer.

Editing officers must remove primary identifying details such as those in the following list:

- account numbers with financial institutions (for example, credit cards, bank account details)
- addresses

[2] It is permissible to identify third parties in certain instances where the information pertaining to the third party is in the public domain. See Step 3 of section 4 of this Attachment.

[3] Knowledgeable persons may include competitors, customers, suppliers, members of industry associations, or those who supply services to the industry such as financial advisers, lawyers, analysts, media analysts.

[4] The appropriate community will be determined on the facts of each case. This test does not require specialised knowledge, and may relate to general knowledge that is commonly known within a community.

- Australian business numbers
- contact details (for example, telephone numbers, fax numbers, email addresses)
- dates of birth
- employee identification numbers (for example, Australian Government Service numbers)
- identification and reference numbers (for example, Administrative Appeals Tribunal reference details)
- licence numbers (for example, driver's licence and firearm's licence numbers)
- Medicare numbers
- names of individuals, companies and other entities
- signatures
- tax file numbers.

Step 2: remove or replace information that may enable the identity of the taxpayer to be ascertained

Other information which when combined with other facts in the advice may potentially identify taxpayers will also need to be removed or replaced with sanitised or generalised information. The following are examples:

- quotes and extracts, including clause, condition, section and paragraph numbers, of contracts, constitutions and other taxpayer/related entity documents that are not in the public domain
- titles and/or positions of persons, such as director, public officer or doctor
- monetary amounts and currency
- geographic locations
- jurisdiction-specific legislation or treaties
- specific descriptions of work or business activity
- relationships and associates
- types and descriptions of assets, products and projects
- matters considered by committees
- medical conditions and treatments
- membership of professional and other bodies
- foreign or domestic government agencies
- industry specific terms or details.

The following examples provide some guidance in editing written binding advice to remove or replace information that may enable the identification of a taxpayer.

Example A (clauses of a contract)

It may be necessary to quote specific clauses of an agreement or contract in a private ruling, but such clauses must be omitted from the edited version (or clauses paraphrased). The following might be used:

> *You have provided relevant clauses of your agreement which detail the obligations of the parties.*

Example B (description of work)

Where advice issues to a prominent indigenous rugby league player seeking to claim a deduction for the value of protective head gear, this may become:

> *You are a professional sportsperson. You wish to claim a deduction for the value of sporting equipment.*

Example C (business activity, geographic location)

A private ruling issues to a company providing engineering services on resource installations in Area A of the Timor Gap Zone of Cooperation. This may become:

> *You are an entity providing services on plant and structures located outside Australia. An international tax agreement does not exist between Australia and the country in which you are providing the services.*

Example D (dates)

Where dates, and exact dates in particular, pose privacy risks, they can be sanitised, using more general dates, or legislated dates. The following might be used instead:

> *The contract was entered into during the relevant income year.*
>
> *The contract was entered into pre-CGT (or post-CGT).*
>
> *The contract was entered into after 20 September 1985.*
>
> *The scheme commences in the year beginning 1 July 2013.*

Example E (relationships and associates, business activity)

Where advice issues to a taxpayer who runs a takeaway food outlet with his wife, their son and daughter and respective spouses, this may become:

> *You and members of your family are joint owners of a small business.*

Example F (description of work)

A customs officer has sought a ruling about the deductibility of his legal costs associated with the successful defence of a criminal charge of receiving a bribe (in connection with the performance of his duties). The customs officer has left the Customs Service and now works in another government department, but the defence of the charge was necessary for his continued prospects of employment. This may become:

> *You have expended legal costs associated with the successful defence of a serious criminal charge (in connection with the performance of your duties) in order to preserve your continued prospects of employment. You have since left that place of employment and now work in another place of employment.*

Example G (monetary amounts)

Monetary amounts can be replaced by general terms or mentioned with reference to legislated amounts. If this is not possible, approximations can be used. The following might be used:

> *You incur net medical expenses in the relevant income year above the relevant medical expenses threshold.*
>
> *You incur net medical expenses in the relevant income year above $2,333 (the legislated amount).*

Step 3: remove or replace information that may enable the identity of a third party to be ascertained

The primary identifying information of third parties named in the document must also be removed in the same manner as for the taxpayer unless:

- the information pertaining to the third party is in the public domain
- the taxpayer's identity could not be ascertained by identifying the third party.

There may be instances where the identity of third parties, or the nature of transactions has been widely publicised and advertised, and is so widely known that the removal of **all** the information which might identify those third parties serves no useful purpose and may hinder the meaning of the edited version. Further, the removal of all such information may impose a significant burden on the productivity of case officers.

Categories of information relating to third parties (**not** the taxpayer) that may be published include the following (this list is not exhaustive):

- The names/transactions of public companies where the information has been disclosed in
  - a prospectus
  - an annual report
  - a media release/press conference
  - a report to a stock exchange (for example, information concerning mergers/acquisitions, share buybacks, share splits).
- The names and products of third parties that provide goods or services to significant numbers of the public (sufficient that the naming of the third party or their products could not identify the taxpayer). For example
  - universities and other places of education
  - clubs and associations with large memberships
  - statutory authorities, such as councils and public utilities.
- Where the goods or services provided by a third party are advertised to the public, and the client base is potentially large. In this case the transaction or arrangement must be one that is very common and used by, or available to, large numbers of people or organisations.
- Information which has been previously published in a publicly available ATO document, such as public rulings and determinations, product rulings, class rulings, media releases and taxpayer alerts.

The following examples provide some guidance in editing written binding advice where third parties are involved.

Example H

A taxpayer has invested in a public company which has merged with another public company and as a result there are capital gains tax implications for all shareholders of that company. In this instance, the mention of the name of the company and the facts of

the merger will not identify the taxpayer. Nor will it reveal information about the third party company which is not already in the public domain. Therefore, this information may be retained in the edited version.

Example I

A taxpayer invests in a financial product which has not been the subject of a product ruling, and asks about the tax effectiveness of the product. The product has been marketed publicly, is widely available to a large population, and is supported by the issue of a prospectus and advertising. The naming of the product, the product promoter, or the features of the product will not identify the taxpayer, or reveal information about the product that is not in the public domain. Therefore, this information may be retained in the edited version.

Example J

A taxpayer is a small business taxpayer and wishes to know the tax effect of transactions it has entered into with another small business taxpayer. The name of both businesses must be removed from the edited version. The nature of the transaction may also need to be generalised if it is peculiar to those businesses.

Step 4: remove or replace confidential information

The final step in editing is to remove or replace information which is confidential in nature to the taxpayer or third parties. Information can be confidential even where the information will not identify the taxpayer or third party. For example, a document may describe a product or a process which, even though the taxpayer is not identified, is of commercial value. The breach of confidence may result in either a competitive or financial disadvantage to the taxpayer or third party. Information that is within the public domain cannot be confidential in nature.

Confidential information is information which has:

- the necessary quality of confidence
- been given in circumstances where the ATO knew or should have known that it was confidential.

Information having a commercial value may include a trade secret (for example, a formula used in a business operation or other information concerning aspects of a business) which may provide an advantage over competitors. The presence of information having a commercial value may be indicated by the extent to which a person guards the confidentiality of the information, the value that the person or competitors place on the information and the investment undertaken to develop the information.

We can only publish confidential information with the consent of the taxpayer that provided that information. If we publish confidential information without consent there may be legal consequences.

The tax effectiveness of arrangements will not, of itself, be accepted as providing a basis for a claim of confidentiality (see, for example, *O'Brien v. Komesaroff* (1982) 150 CLR 310). Such arrangements can be described in the edited version and must still be edited in accordance with the other requirements of Steps 1, 2 and 3 to protect the identity of the taxpayers and third parties.

5. Further examples

The following paragraphs provide further guidance on editing written binding advice.

Example K

An oil company writes to the ATO requesting advice on a proposal to enter into a transaction involving the purchase and installation of oil refining equipment used in a new refining technique. In this case, the editing must be sufficient to prevent the oil companies, the manufacturers of the oil refining equipment and potential investors (knowledgeable persons) from ascertaining the identity of the taxpayer or third party involved in the transaction, and also maintain the confidentiality of information relating to the new refining technique.

Example L

A taxpayer has sought a ruling in relation to certain international financing arrangements for the leasing of a Boeing 747-400 aircraft. This may become:

> *You are seeking advice on the deductibility of interest incurred under a financing arrangement for leasing income-producing equipment.*

If the arrangement was described in the former terms, others in the aviation industry would probably be able to identify the taxpayer. So the industry specific term – Boeing 747-400 – is generalised as income-producing equipment. Furthermore, the phrase 'international financing arrangements' was described as a financing arrangement to further generalise the transaction. Note, however, that if the international nature of the financing was an important aspect of the arrangement, the reference may need to be maintained. Judgment would need to be exercised.

Example M

Using the facts described in Example K, if the oil company proposes to enter a transaction involving the purchase of land on which to construct the new refinery, the significant community would include those residing or doing business in the vicinity of the land to be purchased. In this example, editing officers must consider whether this broader community would be able to identify the taxpayer or third party involved in the transaction.

Example N

A taxpayer is a shareholder in a small private company and asks for advice on transactions they have had with that company. In this case, identifying the company could allow a knowledgeable person to identify the taxpayer, and will also reveal information about the third party company that is not in the public domain. The name of the third party company must be removed from the edited version. The nature of the transaction may also need to be generalised if it is specific to that company.