PS LA 2008/5 - Private advice, guidance and objections - requests for further information, intended use of third party information and notification of the use of assumptions

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Practice Statement Law Administration

PS LA 2008/5

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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.

SUBJECT: **Private advice, guidance and objections – requests for further information, intended use of third party information and notification of the use of assumptions**

PURPOSE: **To provide direction to ATO personnel making decisions about private advice, guidance or objections about:**

- **requesting further information from taxpayers**
- **what to do if requested information is not provided**
- **the use of third party information or assumptions.**

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BACKGROUND

1. The following legislative provisions, applicable to private and oral rulings, provide background to this practice statement.

    - Subsection 357-105(1) of Schedule 1 to the *Taxation Administration Act 1953* (TAA)[1] requires the Commissioner to request that the applicant for a ruling provide further information if the Commissioner considers that further information is required to make the ruling.
    - Subsection 357-105(2) states that the Commissioner may decline to make a ruling if the applicant does not give the information to the Commissioner within a reasonable time.
    - Section 357-110 provides that if the Commissioner decides to make a ruling subject to certain assumptions, he must, before making the ruling:
        - tell the applicant about the assumptions he proposes to make, and
        - give the applicant a reasonable opportunity to respond.
    - Section 357-120 sets out the conditions for taking into account any relevant information from an entity other than the applicant, when making the ruling. These conditions are that the Commissioner must:
        - tell the applicant what the information is and that he intends to take the information into account, and
        - give the applicant a reasonable opportunity to respond before making the ruling.

2. Whilst these provisions apply only to providing private and oral rulings, the same principles and procedures can in some instances be applied in other situations, such as providing guidance or objections.

3. For objections and private rulings, subsection 388-50(1) is also relevant to this practice statement. Applications for objections[2] (including any further information the Commissioner requires) and private rulings[3] are required to be in an 'approved form'. Subsection 388-50(1) provides the requirements for approved forms.

4. The following policy documents and public rulings also provide background to this practice statement.

    - Law Administration Practice Statement PS LA 2008/3 *Provision of advice and guidance by the ATO* explains, among other matters, the forms of advice and guidance the ATO provides to taxpayers about laws administered by the Commissioner.
    - Law Administration Practice Statement PS LA 2005/19 *Approved forms* explains when a document is considered to be in an approved form.
    - Taxation Ruling TR 2006/11 *Private rulings* outlines the system in place for private rulings, as set out in Schedule 1 to the TAA.
    - Taxation Ruling TR 2011/5 *Income tax: objections against income tax assessments* explains what constitutes a valid objection against an income tax assessment, as well as the matters the Commissioner considers when making an objection decision.

[1] All legislative references in this practice statement are to Schedule 1 to the TAA unless otherwise indicated.
[2] Section 14ZU of the TAA.
[3] Subsection 359-10(2).

SCOPE

5. This practice statement outlines the policy for requests for further information, intended use of third party information and the use of assumptions for the following decisions made by ATO personnel:

   - private rulings
   - oral rulings (although ATO personnel would rarely need to apply these policies to oral ruling requests)
   - administratively binding advice[4]
   - private written guidance requested by taxpayers
   - objections
   - reviews[5].

   Hereafter in this practice statement, these are collectively referred to as 'decision' or 'decisions'.

6. This practice statement does not discuss formal information gathering powers, which may be relevant to certain aspects of this practice statement. A summary of the law relating to the ATO's statutory powers for gaining access to information for tax administration purposes, and a description of the way we exercise these powers is contained in the publication *Our approach to information gathering*. A link to this publication is contained in the Other references section at the conclusion of this practice statement.

7. This practice statement does not apply to class rulings and product rulings as the relevant direction for these products is contained in the *Class rulings* and *Product rulings* process documents respectively (hyperlinks are contained in the Other references section at the conclusion of this practice statement).

STATEMENT

Interaction with taxpayers

8. When following the processes and guidelines outlined in this practice statement, case officers must ensure they adhere to the fundamental principles which underpin interaction with taxpayers, being:

   - relevant Taxpayers' Charter principles, and
   - dispute management principles.

   Links to material outlining these are provided in the Other references section at the conclusion of this practice statement.

9. In addition, case officers must use active case management practices when progressing any decision. Active case management requires the case officer to be proactive, including monitoring and anticipating due dates, maintaining effective and appropriate communication with the client, and making a decision on the direction of an issue at the earliest appropriate time. This will include, where possible and appropriate, consolidating interactions with the taxpayer.

[4] A list of topics on which administratively binding advice can be sought is provided in Attachment B to PS LA 2008/3.

[5] Reviews will include formal reviews under the *Superannuation Industry (Supervision) Act 1993*, and other informal review processes, but excludes the independent review process undertaken in the Review and Dispute Resolution business line.

Requesting further information

10. There is only a legislative requirement to ask for further information if it is required in the case of private and oral ruling decisions. For the other decisions covered by this practice statement, it is our policy that we may request further information where it is needed to make that decision.

11. Where further information is required to make a decision, requests for that information are to be made as soon as practicable after a case has been allocated to a case officer. Early requests for further information will enable more timely responses to be provided, and timely case resolution.

12. Wherever possible, a single request for information to the taxpayer is preferable. Straightforward requests may be made by telephone; for example, a request to supply a copy of a trust deed. Where detailed or complex information is required, it will usually be more appropriate to send a written request.

13. For objection decisions, section 14ZYA of the TAA requires the request for further information to be in writing if the timeframe to provide the objection decision is to be extended.

14. A written request should, for objection decisions, include details as to why the information is needed. For other decisions, details as to why the information is needed should also generally be included if the reasoning is not obvious and if it has not already been discussed with the taxpayer, in line with Taxpayers' Charter and dispute management principles.[6]

15. If it is identified that there is a need for subsequent requests for further information, these subsequent requests should be made as soon as the need for the further information becomes apparent. The timeframes indicated in paragraphs 16 to 20 of this practice statement apply to each subsequent instance where it is identified further information is required to make the decision.

Timeframes for requesting further information

16. The timeframes for requesting further information are as follows:

- for non-complex cases[7] – initial request should be made within 14 days of receipt of the application in the ATO
- for complex cases – where necessary, a time in which to request further information should be negotiated within 14 days of receipt of the application in the ATO.

17. The guidelines when providing timeframes for taxpayers to provide the requested information[8] are as follows. These guidelines must be considered in conjunction with the taxpayer's individual circumstances.

    For private and oral rulings, administratively binding advice, objections and reviews:

- the taxpayer should generally be given 28 days to provide information, unless communication with the taxpayer reveals circumstances (see paragraphs 18 to 20 of this practice statement) that indicate that a shorter or longer timeframe is appropriate

[6] Note that if these details are not included, and the application is for a private ruling, the ATO should provide details of why the information is needed if subsequently requested to do so by the taxpayer.
[7] A complex case is defined in the *Service standards counting rules*. A link to this document is provided in the Other references section at the conclusion of this practice statement.
[8] These timeframes apply from the date of the Commissioner's request.

- if the taxpayer has been given 28 days to provide information, but subsequently provides details of special circumstances (see paragraph 20 of this practice statement), an appropriate extension to the 28 days can be negotiated
- if the information is not provided within the timeframes established by either of the first two dot points above, the taxpayer may be granted an additional 14 days to provide the information.

For private written guidance:

- the taxpayer should generally be given 28 days to provide information
- usually no further time should be granted.

18. It would be preferable to negotiate shorter periods in all instances, if the taxpayer agrees that a shorter period is reasonable. A shorter timeframe would be especially appropriate in the case of information that is readily at hand, or where the same information has previously been requested in regard to another matter, for example at audit, but not supplied.

19. Conversely, in limited instances, it may be appropriate to provide a longer timeframe to provide information.

20. Circumstances in which the ATO might consider providing a longer time to provide information are:

- the information request concerns complex matters
- the taxpayer is reliant upon third parties' cooperation to provide the information
- the information needs to be obtained from overseas sources, or
- the taxpayer, whose tax affairs are the subject of the application, has been a victim of natural disaster, such as bushfire, cyclone or flood which followed the lodgment of their application.

Taxpayers should be asked to provide sufficient information regarding the physical, legal or practical difficulties to support the additional time likely to be required.

Where information is not provided

21. Where the requested information is not provided by the taxpayer within the agreed timeframes as set out in paragraphs 16 to 20 of this practice statement, the Commissioner may decline to make the decision, or make a decision on the available facts. The below table outlines the policy for when information is not provided. It should be read in conjunction with paragraphs 22 to 24 of this practice statement.

	Further information not provided within agreed timeframe
Private and oral rulings	Must either decline to rule (refer to subsection 357-105(2)) or rule based on the information provided (if sound to do so).
Administratively binding advice (ABA)	Must either decline to provide advice or provide advice based on the information provided.
Objections and reviews	May make a decision on the available facts. If an objection or review decision cannot be made without the additional information consult with your manager or technical adviser.
Guidance	Provide guidance based on the available facts.

22. Under subsection 359-35(4) if, in the instance of a private ruling application, the Commissioner chooses to decline to make the decision in full or in part, the taxpayer must be notified in writing of this decision. The letter must include notification of the taxpayer's right of review.

23. The case is finalised when the taxpayer is notified in writing of the decision. The 'good management' rule and section 15 of the *Public Governance, Performance and Accountability Act 2013* (promoting proper use and management of public resources for which the Commissioner is responsible) support the administrative right to finalise the case.

24. If the taxpayer supplies the requested information after the decision has been given, it is to be treated as a new request, with the exception of an objection. For an objection, the decision cannot be re-opened, and the taxpayer should generally be advised of their rights to lodge a request for review or appeal[9]. However, where it is clear the additional information would have resulted in a different objection decision, a judgment should typically be made to otherwise resolve the issue, including through an amendment of the relevant assessment.

Using information from third parties

25. For the purposes of this practice statement, information from third parties refers to any information relevant to an application that is provided by an entity or obtained from a source other than the taxpayer.

26. The table below summarises the law and policy when considering using information from third parties. It should be read in conjunction with paragraphs 27 to 33 of this practice statement.

Private and oral rulings	Section 357-120 provides that the Commissioner may take into account any relevant information provided by an entity other than the applicant if the Commissioner: (a) tells the applicant what that information is and that it is intended to be used, and (b) gives the applicant a reasonable opportunity to respond before making the ruling.
Administratively binding advice (ABA)	Third party information is not to be used.
Objections and reviews	There is no legislative direction in terms of the use of information from third parties for objections and reviews. Information from third parties may be used when making an objection or review decision. In the interest of natural justice and in accordance with dispute management principles, the procedures and principles for private rulings should be used as a guide, subject to the exception noted in paragraph 29 of this practice statement.
Guidance	Third party information is not to be used.

[9] See TR 2011/5 *Income tax: objections against income tax assessments*.

27. Case officers must only use third party information in making a private ruling where it is readily available, reliable and will reduce the response time. Examples of such information would be:

- corporate details available from the Australian Securities and Investments Commission
- information available from the Australian Business Register, or
- where information is publicly available from the taxpayer's official website.

28. If third party information is material to a private ruling decision, but does not meet the above requirements, the Commissioner may decline to rule. Case officers must discuss what action to take with their managers or technical advisers.

29. The restriction outlined in paragraph 27 of this practice statement for using third party information in private rulings only where that information is readily available does not apply when making objection or review decisions. For objection or review decisions, case officers should use third party information, including that accessed using formal powers, as required to make a correct decision.

30. Subject to the exceptions outlined in section 355-45 and 355-50[10], if disclosure of the relevant information would breach the tax secrecy provisions, privacy legislation or the confidentiality of the person providing the information, the information should not be used in making the decision. Case officers should discuss what action to take with their managers or technical advisers.

31. If the Commissioner wishes to use third party information, case officers must notify the taxpayer of that information as soon as they are aware of its existence and of its relevance to the decision at hand. Notification may be by telephone. However, the notification must be in writing:

- if the taxpayer cannot be contacted by telephone, or
- where the information is complex and the taxpayer is likely to need time to consider the information.

32. The principles in paragraphs 16 to 20 of this practice statement should be used as guidance on what would be considered a reasonable time to respond to the Commissioner's notification that third party information is to be used in the decision.

33. Where the taxpayer does not respond to a notification of intention to use third party information within a reasonable time, the Commissioner may either make a ruling using the information, decline to make a ruling or decide an objection using the information. Case officers should seek guidance from their manager or technical adviser if required.

Making assumptions

34. An assumption, for the purposes of this practice statement, is a presumption that an unknown fact is true. The decision being made is dependent upon that fact being true. An assumption is more than making an inference from known facts, or for example, progressing a decision based on a basic proposition, such as that the taxpayer is carrying on a business, or is a resident for taxation purposes.

[10] These sections provide exceptions to the confidentiality of taxpayer information where information is already publicly available, or when disclosed in performing duties as a taxation officer.

35. The table below summarises the law and policy when considering making assumptions. It should be read in conjunction with paragraphs 36 to 40 of this practice statement.

Private and oral rulings	Assumptions are only made if the Commissioner reasonably expects those assumptions to eventuate. The Commissioner must notify the applicant of assumptions being made, giving a reasonable time to respond (subsection 357-110(1)).
Administratively binding advice (ABA)	No fundamental assumptions can be made. If providing administratively binding advice on a proposed scheme, the material elements of any proposed scheme must be settled and clearly stated by the taxpayer in their request.
Objections and reviews	No assumptions allowed (other than objections against private rulings, in which case no new assumptions may be introduced).
Guidance	No assumptions needed.

36. Generally, where a decision cannot be made on the facts available, the Commissioner will only make assumptions about unknown facts where that assumption is one that the Commissioner reasonably expects to eventuate.

37. Assumptions must not be made where the taxpayer should be able to provide the required information, or the information can be readily obtained from another source.

38. In the case of a private ruling, where assumptions are considered necessary to make a correct ruling, case officers must notify the taxpayer as soon as this is decided.[11] Notification may be by telephone. However, the notification is to be in writing:

- if the taxpayer cannot be contacted by telephone, or
- where the taxpayer is likely to need time to consider the assumptions.

39. The principles in paragraphs 16 to 20 of this practice statement should be used as guidance on what would be considered a reasonable time to respond to the Commissioner's notification that assumptions are intended to be used.

40. Where the taxpayer disputes the assumption, or agrees with the assumption but disputes the Commissioner's use of it, generally the Commissioner would decline to make the ruling. If the taxpayer does not respond to a notification of intention to use assumptions within a reasonable time, the Commissioner may either make the ruling subject to the assumptions, or may decline to make the ruling.

Records management

41. Case officers are to ensure that case records reflect all actions taken in respect of requests for further information, use of third party information and assumptions. See Chief Executive Instruction CEI 2014/01/01 *Records Management Policy and Guidelines* which sets out the ATO policy for managing records and business information assets such as documents and emails. A link to this practice statement is contained in the Other references section at the conclusion of this practice statement.

[11] Note that in some instances the taxpayer may request the use of assumptions. In this situation, these requirements will not be necessary.