PS LA 2008/5 - Written binding advice (private) - requests for further information, notification of assumptions and intended use of information from sources other than the applicant

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Australian Government
Australian Taxation Office

Practice Statement Law Administration

PS LA 2008/5

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FOI status: may be released

This practice statement is issued under the authority of the Commissioner of Taxation and must be read in conjunction with Law Administration Practice Statement PS LA 1998/1. It must be followed by ATO staff unless doing so creates unintended consequences or is considered incorrect. Where this occurs ATO staff must follow their business line's escalation process.

SUBJECT: **Written binding advice (private) – requests for further information, notification of assumptions and intended use of information from sources other than the applicant**

PURPOSE: **To provide direction to ATO staff about the timing practices to be followed where:**

- **requesting further information from applicants, and**
- **the further information is not provided, or**
- **dealing with applicants when the ATO intends to make assumptions or use third party information.**

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BACKGROUND

1. Law Administrative Practice Statement PS LA 2008/3 – Provision of advice and guidance by the Tax Office explains among other matters, the forms of

advice, including private rulings and administratively binding advice, the ATO provides to clients about laws administered by the Commissioner.

2. For some applications for written binding advice it may be necessary to obtain further information in order to provide the advice sought. Where further information is required, it might be obtained in the following ways:

   - the case officer may ask the applicant to provide the information, or
   - the Commissioner may use information from a source other than the applicant (a third party) subject to certain conditions.

   In addition, for some applications the Commissioner may make assumptions; for example, about a future event that he reasonably expects to eventuate.

3. Subsection 357-105(1) of Schedule 1 to the *Taxation Administration Act 1953* (TAA)[1] requires the Commissioner to request the applicant for a private ruling to provide further information if the Commissioner considers that further information is required to make the ruling. Under subsection 357-105(2) the Commissioner may decline to make the ruling if the applicant does not give the information to the Commissioner within a reasonable time.

4. Section 357-120 sets out the conditions for using information from a source other than the applicant, when making private rulings. These conditions are that the Commissioner must tell the applicant what the information is and that he intends to use the information, and must give the applicant a reasonable opportunity to respond to the notification.

5. If the Commissioner decides to make a private ruling subject to certain assumptions, he must notify the applicant about the assumptions he proposes to make and give the applicant a reasonable opportunity to respond (section 357-110).

STATEMENT

Requests for further information

6. Where further information is requested from an applicant, the initial request should be made within 14 days of receipt of the application by the ATO. This is in accordance with the ATO service standards for private written binding advice (a link to Our Service Standards is available at the end of this document). Subsequent requests, if necessary, should be made as soon as the need for the information becomes apparent.

7. 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.

8. The applicant is to be asked to supply the information within 28 days from the date of our request for further information. This timeframe may be extended where, in taking into account the applicant's circumstances, it is apparent that more than 28 days will be required to provide the requested information. The new agreed timeframe should only be granted where the applicant provides a reasonable explanation as to why the information cannot be provided within 28 days. Explanations that will be considered reasonable include where:

   - the application concerns complex matters

[1] All legislative references in this practice statement are to Schedule 1 to the TAA unless otherwise indicated.

- the applicant is reliant upon third parties' co-operation to provide the information
- information needs to be obtained from overseas sources, or
- the applicant and/or the entity, whose tax affairs are the subject of the ruling, has been a victim of a natural disaster, such as a bushfire, cyclone or flood.

An agreed timeframe longer than 28 days must be approved by a manager or authorised approving officer.

9. If an applicant subsequently finds they are unable to meet either the 28 days or the agreed timeframe, they may re-negotiate their reply date subject to the conditions set out in paragraph 8 of this practice statement. The renegotiated timeframe must also be approved by a manager or authorised approving officer.

10. Where the requested information has not been received within 28 days, or within the agreed timeframe, and the applicant has not requested further time, a written or oral reminder is to be given immediately, granting the applicant a maximum of a further 14 days to provide the information.

11. In respect of private rulings under Division 359, where requested information is not supplied within a reasonable time, the Commissioner may decline to make the ruling (subsection 357-105(2)). Where the further information has not been received within the time set out in paragraphs 8 to 10 of this practice statement, the case is to be finalised and the relevant information technology systems are to be annotated accordingly.

12. The applicant is to be notified in writing, by way of a standard letter, of the Commissioner's decision to decline to make the ruling. The standard letter includes notification of the applicant's right of review.

13. For the purposes of records management, the case is to be treated as finalised when the applicant is notified in writing of the decision. The 'good management' rule and section 44 of the *Financial Management and Accountability Act 1997* (efficiency in the use of resources) support the administrative right to finalise the case.

14. If the applicant supplies the requested information after the case has been finalised, it is to be treated as a new application for written binding advice, and a new case is to be created in the relevant information technology system. In actioning the case, staff should refer to the Online Resource Centre for Law Administration (ORCLA) and follow the processes set out therein. A link to ORCLA is provided at the end of this document.

Information from third parties

15. Staff must only use third party information where it is readily available, reliable and will reduce the response time. 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 must not be used in making the private ruling. If this information is material to the outcome of the ruling, the Commissioner may decline to make the ruling.

16. Staff who have access to third party information that is material to the outcome of the ruling, and who cannot use it due to privacy and secrecy provisions, must discuss the situation with their managers or technical

advisers. In deciding what action to take they should be guided by their manager or technical adviser, and by the instructions in ORCLA.

17. If the Commissioner wishes to use information from sources other than the applicant, he must notify the applicant of the information as soon as he is aware of its existence and relevance to the ruling. Notification may be by telephone. However, if the applicant cannot be contacted by telephone, or where the information is complex or the applicant is likely to need time to consider the information, the notification is to be in writing.

18. The applicant is generally to be given 28 days to respond. In most cases 28 days is considered to be a timeframe within which the applicant has a reasonable opportunity to respond, as required by the legislation. However, this must be decided on a case by case basis, taking into account such factors as referred to in paragraph 8 of this practice statement.

19. Where the applicant does not respond to a notification of intention to use third party information within a reasonable time, the Commissioner may either make the ruling using the information, or may decline to make the ruling. Provided the information is readily (for example, publicly) available and reliable, and does not breach privacy or secrecy laws, case officers should use the information. If in doubt, they should seek guidance from their manager or technical adviser.

20. The Commissioner will not use third party information when providing administratively binding advice.

Making assumptions

21. Generally, where a ruling cannot be made on the facts available, the Commissioner will decline to rule. He will only make assumptions about unknown facts such as future events, and where an assumption is made it must be one that the Commissioner reasonably expects to eventuate. Assumptions must not be made where the applicant should be able to provide the required information, or the information can be readily obtained from another source. Staff who are unsure about assumptions, and when to use them, should refer to ORCLA.

22. Where the Commissioner considers that he needs to make assumptions when making the ruling, he must notify the applicant as soon as he has decided that he intends to make the assumptions. Case officers must use the same process for third party information, and, where required to send a letter, must use the appropriate standard letter.

23. As with third party information, the applicant is to be given 28 days to respond. However, applicants may need additional time and requests for additional time must be decided on their merits taking into account such factors as referred to in paragraph 8 of this practice statement.

24. Where the applicant disputes the assumption, or agrees with the assumption but disputes our use of it, generally we would decline to make the ruling. If the applicant 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. Case officers should seek guidance from their manager or technical adviser, and refer to ORCLA.

25. The Commissioner will not make assumptions when providing administratively binding advice.

General rules

26. Case officers are to ensure that case records reflect all actions taken in respect of requests for further information and notification of assumptions and third party information. They must annotate relevant information technology systems appropriately.

Multiple contacts with applicants – further information, assumptions and/or third party information

27. Case officers should attempt to coordinate contacts with the applicant so that a request for further information may be combined with notifications of assumptions or intention to use third party information. Case officers should contact the applicant and negotiate a sensible and practical outcome that takes all requirements into consideration.

EXPLANATION

28. The policy set out in this practice statement has been developed to ensure consistent and appropriate treatment of cases that are awaiting further information or contact from applicants.

29. For the purposes of this practice statement, written binding advice means:

    - a private ruling under Division 359 and
    - administratively binding advice – an exhaustive list of topics on which administratively binding advice may be provided can be found in Law Administration Practice Statement PS LA 2008/3 Attachment B.

      Note: this practice statement only applies to administratively binding advice in respect of requests for further information. The ATO will not use third party information or make assumptions when providing administratively binding advice (see paragraphs 20 and 25 of this practice statement respectively).

30. If the Commissioner needs further information, he must ask the applicant to provide that information (section 357-105). However, where the information is readily available from other reliable sources, and there are no tax secrecy, privacy or confidentiality barriers to informing the applicant about the information, the Commissioner may use information obtained from third parties. He must tell the applicant what the information is and that he intends to use it in making the ruling, and give the applicant a reasonable opportunity to respond (section 357-120).

31. In some circumstances, the Commissioner may make assumptions, for example about a future event that he reasonably expects to eventuate. Again, he must tell the applicant what assumptions he intends to make when making the ruling, and give the applicant a reasonable opportunity to respond (section 357-110).

32. A decision not to deal with an application for written binding advice is a decision to which the *Administrative Decisions (Judicial Review) Act 1977* applies. Such decisions may be the subject of an application to the Federal Court or the Federal Magistrate's Court for judicial review.

Amendment history

Date of amendment	Part	Comment
18 April 2013	Contact details	Updated.
8 April 2011	Contact details	Updated.
1 July 2010	Paragraphs 6, 27, 28 and 29 Paragraph 33	Deleted, and amended, to reflect measures in the *Tax Laws Amendment (2010 GST Administration Measures No. 2) Act 2010* to include indirect tax rulings in the general rulings regime.
2 Sept 2009	Contact details	Updated.
11 Sept 2008	Paragraphs 9 and 10	Amended to clarify when a manager or authorised approving officer must approve the due date when requesting further information.

Subject references	administratively binding advice assumptions decline to make a private ruling extension of time to provide advice private rulings private indirect tax rulings requests for further information Taxpayers' Charter service standards third party information written binding advice
Legislative references	TAA 1953 Sch 1 Div 357 TAA 1953 Sch 1 357-55 TAA 1953 Sch 1 357-105 TAA 1953 Sch 1 357-105(2) TAA 1953 Sch 1 357-110 TAA 1953 Sch 1 357-120 TAA 1953 Sch 1 359-10(2) TAA 1953 Sch 1 388-50 TAA 1953 Sch 1 Div 359 AD(JR) Act 1977 Financial Management and Accountability Act 1997 44
Related practice statements	Law Administration Practice Statement PS LA 2008/3
Case references	
Other references	Our Service Standards Online Resource Centre for Law Administration (links available internally only) Taxpayer fails to provide information Using third party information When assumptions can be made
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Authorised by	Mike Bond Assistant Commissioner Law Practice Improvement Branch Law and Practice
Other Business Lines consulted	All
Contact Officer	Joanna Wilson
Business Line	Law and Practice
Section	Corporate Policy and Process
Phone	(02) 6216 1657