PS LA 2011/27 - Matters the Commissioner considers when determining whether the Australian Taxation Office (ATO) view of the law should only be applied prospectively

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Note: This practice statement is being amended as a result of the publication of PS LA 2012/1 and consequential amendments being made to PS LA 2003/3. Guidance on the policy in PS LA 2011/27 below can be obtained from the contact officer, or here (link to amended issue escalation pathway page) until this amendment is finalised.

A compendium of comments is available for download here.

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Australian Government
Australian Taxation Office

Practice Statement Law Administration

PS LA 2011/27

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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 tax officers unless doing so creates unintended consequences or where it is considered incorrect. Where this occurs, tax officers must follow their business line's escalation process.

SUBJECT:	**Matters the Commissioner considers when determining whether the Australian Taxation Office (ATO) view of the law should only be applied prospectively**
PURPOSE:	**To explain the procedures for tax officers to follow and the matters to take into account in determining whether the ATO should not take action to apply its view of the law in past years or periods**

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SCOPE

1. This practice statement:

   - outlines procedures to be followed and the factors to be considered by tax officers in relation to any circumstance in which the ATO is considering applying its view of the law
   - must be followed in any circumstance where a tax officer applies the ATO view of the law.

   In this context, applying the ATO view of the law includes undertaking compliance activities, providing interpretative advice or guidance or deciding the date of effect of a precedential ATO view document, such as a public ruling or ATO interpretative decision (ATO ID).

BACKGROUND

2. This practice statement has been developed in response to the recommendations of the Inspector-General of Taxation (IGT) in the report *Review into delayed or changed Australian Taxation Office views on significant issues* released in March 2010.[1]

[1] In particular see Recommendations 2 and 4.

Legal framework

3. In considering the circumstances when the ATO will not take action to apply its view of the law in past years or periods, it is important to have regard to the legal framework under which the ATO administers the taxation and superannuation laws.

4. As a starting point, the law operates from the date of effect of the relevant legislative provision and, accordingly, the ATO would usually apply its view of the law from this date, with effect both before and after the view is formed. The legal framework does provide exceptions to this general rule and this is explained below.

5. Under the current self-assessment regime (or self-actuating basis for the indirect tax laws),[2] taxpayers' returns (including activity statements) are generally accepted at face value, subject to post-assessment audit or other verification by the ATO. Under this system, a taxpayer's statement in their return is taken to represent their view of how the law applies to their circumstances.[3]

6. Time limits apply to both taxpayers and the ATO which restrict the ability to amend assessments beyond set timeframes. These time limits provide taxpayers with finality and certainty in relation to past years or periods.

Rulings regimes

7. In order to reduce the risks of uncertainty for taxpayers the current legislative framework protects taxpayers through the public, private and oral rulings regimes. For example, the private rulings regime offers a taxpayer the opportunity to obtain certainty about the application of the tax laws in relation to their specific tax affairs.

8. A taxpayer who follows a public, private or oral ruling that applies to them can be assured that the Commissioner is bound to assess them as set out in the ruling in relation to a particular matter.[4] When the Commissioner is bound by the ruling and the correct application of the law is less favourable to a taxpayer than the ruling provides, the ruling protects the taxpayer against the law being applied by the Commissioner in that less favourable way.

9. A public ruling usually applies to both past and future years and protects a taxpayer from the date of its application which in the usual case would be from the date of effect of the relevant legislative provision. In addition, a public ruling that is withdrawn continues to apply to schemes that had begun to be carried out before the withdrawal.[5] However, this rule does not apply to an indirect tax public ruling or an excise public ruling.

10. Even if a taxpayer does follow a ruling, the Commissioner may apply a relevant provision of the law in a way that is more favourable for the taxpayer where it is a correct application of the law. This may happen where the Commissioner subsequently comes to the view that the ruling is incorrect and disadvantages the taxpayer (provided the Commissioner is not prevented from doing so by a time limit imposed by the law).[6]

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[2] The GST, luxury car tax, wine equalisation tax and fuel tax credits systems currently operate on a self-actuating basis. Under this system, a taxpayer is automatically liable for tax or entitled to a refund based on the liabilities and entitlements attributable to a tax period.
[3] Explanatory Memorandum to the Tax Laws Amendment (Improvements to Self Assessment) Bill (No.2) 2005. See also paragraph 37 of Taxation Ruling TR 2006/10.
[4] See section 357-60 of Schedule 1 to the *Taxation Administration Act 1953* (TAA).
[5] See subsection 358-20(3) of Schedule 1 to the TAA.
[6] See section 357-70 of Schedule 1 to the TAA.

11. The ATO's approach for determining the date of effect of public rulings is set out in Taxation Ruling TR 2006/10.[7] The procedures outlined in this practice statement are consistent with this approach.

Administratively binding advice

12. Law Administration Practice Statement PS LA 2008/3 provides that, in the interests of sound administration, the ATO's practice has been to provide administratively binding advice in a limited range of circumstances.[8] These circumstances and the protection level provided by administratively binding advice are considered in detail in PS LA 2008/3.[9]

Other circumstances

13. In other circumstances the law will apply to both past and future transactions. The existence of uncertainty in the interpretation or application of the taxation laws is a matter that may affect the amount of penalty imposed or remitted.

14. The law also provides protection for taxpayers from penalties and interest charges where a taxpayer self assesses in accordance with ATO guidance or a general administrative practice.[10]

Matters under the Superannuation Guarantee (Administration) Act 1992

15. There is no legislative framework for the provision of public, private or oral advice on matters under the *Superannuation Guarantee (Administration) Act 1992* (SGAA). The ATO provides administratively binding advice in relation to this law.

16. For matters involving the ATO's role in administering the SGAA provisions, the principles discussed in this practice statement are also relevant to deciding what action should be taken where an employer has failed to meet the requirements of the SGAA. In making a decision whether to apply a view of the law only on a prospective basis, the Commissioner also needs to take into account the interests of affected employees.

Matters under the Superannuation Industry (Supervision) Act 1993

17. The *Superannuation Industry (Supervision) Act 1993* (SISA) provides for sanctions that may be applied to trustees of self managed superannuation funds (SMSFs) for contraventions of the SISA.

[7] See paragraphs 59 to 77 of TR 2006/10. A similar approach was also adopted by the ATO prior to the publication of this ruling – see withdrawn Taxation Ruling TR 92/20.
[8] Attachment B to PS LA 2008/3 contains an exhaustive list of those circumstances in which the ATO can provide administratively binding advice to a taxpayer.
[9] The material in PS LA 2008/3 about administratively binding advice is currently being reviewed.
[10] See sections 284-215, 298-20, 361-5 of Schedule 1 to the TAA and section 8AAG of the TAA. For statements made on or after 4 June 2010 see also subsection 284-75(5) and section 284-224 of Schedule 1 to the TAA.

18. Under paragraph 42A(5)(b) of the SISA, the Commissioner has a discretion to treat a superannuation fund as complying even if a trustee contravened one or more of the regulatory provisions in the SISA. To the extent that the ATO has facilitated or contributed to taxpayers adopting a course of action that led to a contravention, the principles discussed in this practice statement are relevant to the exercise of that discretion.[11]

19. Law Administration Practice Statement PS LA 2006/19 Self managed superannuation funds – notice of non-compliance provides further guidance about the exercise of the discretion under paragraph 42A(5)(b) of the SISA.

Powers of general administration

20. The Commissioner has powers of general administration which can be exercised in relation to management and administrative decisions.[12] Section 44 of the *Financial Management and Accountability Act 1997* (FMAA) also imposes a general obligation on the Commissioner to manage the affairs of the ATO in a way that promotes proper use of the Commonwealth resources for which the Commissioner is responsible. In this context, 'proper use' means that the Commissioner needs to make decisions about the allocation of ATO resources to compliance and other activities which promote the efficient, effective and ethical use of those resources. However, in doing so the Commissioner must still comply with the law.[13]

21. The Commissioner cannot use the powers of general administration to accept non-compliance with the law.[14] However, as part of the duty of good management, the Commissioner can decide not to undertake compliance action on a particular issue for prior years or periods. Law Administration Practice Statement PS LA 2009/4 discusses the exercise of the Commissioner's powers of general administration. It includes a range of factors[15] the Commissioner will take into account in deciding whether to undertake compliance action in relation to prior years or periods.

22. This practice statement does not replace or modify PS LA 2009/4. One of the factors mentioned at paragraph 23 of Appendix B of PS LA 2009/4 is whether the ATO has contributed to non-compliance. This practice statement amplifies and clarifies this specific factor and explains the practices and procedures to be followed.

23. The ATO will not take action to apply its view of the law in past years or periods where it is considered appropriate not to do so after having regard to the approach and factors outlined in this practice statement. This is so regardless of the other factors listed in PS LA 2009/4.

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[11] *Law Administration Practice Statement PS LA 2009/5 Provision of advice and guidance by the ATO in relation to the application of the Superannuation Industry (Supervision) Act 1993 and the Superannuation Industry (Supervision) Regulations 1994 to Self Managed Superannuation Funds* explains the weight to be given to self managed superannuation fund advice and guidance provided by the ATO and the appropriate compliance action to be taken if a taxpayer has relied on this advice or guidance.

[12] For example, section 8 of the *Income Tax Assessment Act 1936* for income tax laws and section 43 of the *Superannuation Guarantee (Administration) Act 1992* for the superannuation guarantee law.

[13] See subsection 44(2) of the FMAA. For more information on the scope of the Commissioner's powers of general administration see Law Administration Practice Statement PS LA 2009/4.

[14] The courts have held that although the powers of general administration conferred on the Commissioner are very broad, they cannot be used to extend, confine or undermine Parliament's intentions.

[15] See paragraphs 21 and 23 of Appendix B of PS LA 2009/4.

STATEMENT

24. Before applying any product, position, opinion or view of the law, tax officers are required to determine whether there are circumstances which would make it appropriate to take action to apply the ATO view of the law only on a prospective basis.

25. To do this tax officers must:

    (a) undertake research to form an opinion whether any ATO publication, product or evidence of ATO conduct could have reasonably conveyed a different view of the law on a particular issue, to taxpayers generally, or to a particular class or industry group and

    (b) consider the factors outlined at paragraph 36 of this practice statement.[16]

    Appendix A illustrates this process diagrammatically.

26. The factors outlined at paragraph 36 of this practice statement are not exhaustive and are not intended to limit the Commissioner's powers. No one factor by itself is conclusive. Tax officers should consider all the factors and any other relevant circumstances relating to their particular case and weigh these up in reaching an overall conclusion. The weight to be given to individual factors will differ depending on the facts and circumstances of the particular case.

27. These factors apply to views adopted by taxpayers generally, a class of taxpayers or an industry wide practice. They **do not** apply to views adopted by a single taxpayer. A decision in relation to a single private ruling or audit would not be sufficient of itself to demonstrate that the ATO has facilitated or contributed to the development of particular views by taxpayers generally or an industry practice.

28. If the ATO view is to apply only on a prospective basis, this must clearly be stated in the document, advice to, or communication with, the taxpayer and the reasons for this decision provided.

29. If the issue of whether the ATO view should apply only on a prospective basis was specifically raised for consideration during the preparation of the document or advice or otherwise raised in the course of conducting compliance activities (for example it was specifically addressed in correspondence between the taxpayer and the ATO or raised as an issue as part of a consultation process), then the taxpayer should be advised of the ATO's decision and reasons for the decision in relation to this matter.

30. However, if the issue was not specifically raised for such consideration and ATO research does not uncover any evidence of previous ATO publications or conduct conveying a different view, then in most circumstances, there would be no need for tax officers to provide a written explanation of why the ATO view will apply in past years or periods. For example, when preparing an ATO ID that will have application both before and after its date of issue, there is no requirement for the ATO ID to specifically state this. It is only considered necessary to make a statement regarding the application date of the new view if the view is to be applied only on a prospective basis.

[16] See also paragraph 37 of this practice statement if dealing with an SGAA matter.

EXPLANATION

Consider previous ATO publications and conduct

31. Before applying any new product, position, opinion or view of the law, ATO case officers are required to conduct their own research (at a minimum, by searching ATOlaw and, as appropriate, other material such as that found on the ATO external website) and form an opinion whether any ATO publications, products or conduct could have reasonably conveyed a different view on a particular issue. [17]

32. Where tax officers consider that the application of the existing precedential ATO view would result in an outcome that is incorrect or unintended, or there is a significant alternative view to the precedential ATO view, this issue must be escalated to the relevant Centre of Expertise or Tax Counsel Network in accordance with the process outlined in Law Administration Practice Statement PS LA 2003/3.[18]

33. If a tax officer proposes to change an existing precedential ATO view or an existing general administrative practice, this matter must be brought to the attention of the Chief Tax Counsel (CTC) or a Deputy Chief Tax Counsel (DCTC) for a decision. Any changed precedential ATO view cannot be published without clearance from a DCTC[19] (or the CTC where appropriate).

34. The results of the research mentioned in paragraph 31 above, and the factors outlined below, are all matters that are taken into account as part of the process for determining whether the ATO view of the law should only be applied prospectively.

Relevant factors

35. In considering the circumstances when the ATO will not take action to apply its view of the law in past years or periods, tax officers must have regard to the following factors.

36. If after considering the main factors in paragraph (a) below, a conclusion is reached that the ATO view should only be applied prospectively, this position will be overridden in individual cases if the factors in paragraphs (b) or (c) apply.

Main factors

(a) The extent to which the ATO has facilitated or contributed to taxpayers adopting a different view of the law (which may result from an industry practice or position), including:

(i) whether the ATO became aware of the position adopted by taxpayers or an industry practice in applying the law (for example, through compliance activity) but did not challenge it within a reasonable timeframe having regard to the size of the risk

(ii) whether the taxpayers' position or industry practice can be reasonably understood from ATO statements on how to apply the law

[17] Paragraph 6 of PS LA 2003/3 provides that tax officers must identify and apply the precedential ATO view.
[18] See paragraphs 31 and 32 of PS LA 2003/3.
[19] See paragraph 35 of PS LA 2003/3.

(iii) whether a general administrative practice[20] supporting the taxpayers' position or industry practice can be deduced from other ATO conduct

(iv) the time that has elapsed since the ATO's first awareness of the issue, publicly announcing it would challenge the position or practice[21] and the time taken to finalise its view.

Overriding factors in individual cases

(b) If there is evidence of fraud or evasion in a particular case.

(c) Where tax avoidance is involved, for example, where a determination has been made to apply a general anti-avoidance provision. However, this factor does not apply if there was an administrative practice that an anti-avoidance provision did not apply in a particular factual context.

37. As pointed out at paragraph 16, in respect of superannuation guarantee matters, a relevant additional factor which must be taken into account is the interest of affected employees if the ATO view of the law were only applied prospectively.

(a) Taxpayers' views and industry practices

38. In some instances, industry practices or views adopted by taxpayers may develop in relation to particular technical issues. Taxpayers may have adopted a practice that has existed for a number of years in the absence of any specific ATO advice or guidance on the issue. What needs to be considered is whether the ATO has contributed to such a view or practice.

39. Facilitating or contributing to the development of taxpayers' views or an industry practice requires more than merely providing a view in, for example, a private ruling or not publishing a view on the issue. It also involves more than conducting compliance activities in relation to a taxpayer who has adopted a particular approach and deciding not to take action in relation to that issue based on an assessment of the risk. A decision in relation to a single private ruling or audit would not be sufficient of itself, but may be indicative of a wider practice or view of the law.

40. In the context of discussions around rulings or audits, if the ATO provides a preliminary view in respect of the issues involved, these preliminary views are not in any way binding on the Commissioner and should not be considered as facilitating or contributing to the development of taxpayers' views or industry practice if the ATO later changes its view or position. This is also the case where the ATO provides preliminary views during pre-enactment discussions on the design of law changes.

41. Taxpayers and representatives may sometimes conclude that the ATO has a position on an issue based on comments in speeches or at conferences or meetings. In order to minimise any misunderstanding of an ATO position, tax officers should ensure as far as possible, that their comments are accurately recorded, for example, in records of meetings or conferences.

[20] For further information about general administrative practice refer to TR 2006/10 and TD 2011/19 – *Tax administration: what is a general administrative practice for the purposes of protection from administrative penalties and interest charges?*

[21] An example of the way in which the ATO may make taxpayers aware that they are challenging a position or practice is by publishing a Taxpayer Alert on the ATO website.

42. Whether an industry practice exists would need to be determined by evaluating any relevant evidence to support the practice. This could include published documents on an industry website, academic or conference papers, speeches or minutes from industry forums, ATO publications referring to the industry practice etc. The publication of a single document of itself may not be sufficient to establish an industry practice. However, the publication of a document on the ATO's website that accepts the industry practice would be evidence that the ATO has facilitated or contributed to the establishment of the industry practice. In the context of self assessment, simply issuing assessments consistent with the information returned by taxpayers in a particular industry would not by itself amount to an acceptance by the ATO of any industry practice.

43. If it is unclear in a particular case whether an industry practice exists or there is a perception that the ATO has facilitated or contributed to an industry practice then tax officers should consult with relevant industry stakeholders, usually through the relevant ATO forum for the industry concerned.

44. As a means of identifying issues where there may be uncertainty, including where the ATO may have contributed to the development of a practice or view adopted by taxpayers, the ATO will be looking to have ongoing discussions with professional advisers. To improve the timely identification of areas of uncertainty and potential contention, tax advisers and taxpayers themselves are encouraged to bring issues to the ATO's attention, including in the annual tax return, and engage in discussions with the ATO.

45. Where after having conducted research, it is considered that no different taxpayer or industry practice exists or that the ATO has not facilitated or contributed to any different practice, the onus will then be on taxpayers or their representatives to provide evidence to the contrary.

When is the ATO considered not to have challenged taxpayers' positions or industry practices within a reasonable timeframe?

46. What is considered to be a reasonable timeframe for the ATO to challenge a position or practice is a matter of judgment and will depend on all of the facts and circumstances. This will include the assessment of the size of the risk involved and the ATO's knowledge or awareness of the context in which the position or practice was being applied. If there was evidence of the ATO being aware of a particular industry practice and it did not alert taxpayers or the industry to its contrary view and it did not finalise its view for a lengthy period of time, then this would be a case in which it would be expected that the ATO would apply its view only on a prospective basis.

47. For example, where the ATO was aware of the practice (as evidenced in ATO publications, transcripts of speeches or minutes of ATO forum meetings) and had conducted a series of audits in that industry and determined not to take compliance action in relation to that issue, then it would be more likely that the ATO would be considered to have facilitated or contributed to the practice.[22]

[22] An example of an unreasonable timeframe is outlined in Example 4 in this practice statement.

(b) and (c) Evidence of fraud, evasion or tax avoidance

48. In determining whether any anti-avoidance provisions apply, officers should have regard to relevant ATO policy documents, for example, Law Administration Practice Statement PS LA 2005/24 which is about the application of the general anti-avoidance rules or Law Administration Practice Statement PS LA 2008/10 which is about the application of section 45B of the *Income Tax Assessment Act 1936* to share capital reductions.

49. Law Administration Practice Statement PS LA 2008/6 provides guidance in determining whether there has been fraud or evasion.

50. In cases where there is evidence of fraud, evasion or tax avoidance then it could be expected that the ATO would take action to apply its view of the law in past years or periods.

Approval process for deciding not to apply the ATO view of the law in past years or periods

51. For a public ruling (other than a class or product ruling) or a determination a DCTC (or the CTC if appropriate) will decide whether the view should be applied only on a prospective basis. Where a proposed public ruling is reviewed by the ATO's Public Rulings Panel, that Panel will also consider date of effect issues as part of its advice.

52. For class and product rulings, ATO IDs and compliance activities approval of the decision not to take action to apply the ATO view in past years or periods must be made by an SES officer whose normal duties include making these types of decisions.

EXAMPLES

53. The following examples illustrate how the Commissioner would apply the factors outlined at paragraph 36 of this practice statement. The examples are not intended to be exhaustive or prescriptive and they do not consider the application and remission of penalties.

54. Each decision must be made based on all the relevant circumstances relating to the particular issue.

55. In all of the examples it is assumed that there was no evidence of tax avoidance, fraud or evasion.

Examples of cases where it may be appropriate to take action to apply the ATO's view of the law only on a prospective basis

Example 1 – ATO aware of existing practice through compliance activity

56. *The Commissioner became aware through compliance activities that taxpayers in the same industry were taking a particular approach to the application of a provision of the tax law. The Commissioner concluded that the approach adopted by the industry had some legal merit and was reasonably open to taxpayers to adopt. However, the risk associated with this issue was not considered to be high and so the Commissioner, in exercising the duty of good management, determined not to undertake any further compliance action in relation to the issue. The practice was referred to in some guidance material that was published on the ATO website.*

57. *Some years later, the Commissioner decided to issue a public ruling outlining the Commissioner's views on the application of that provision. The views in the draft and final public ruling were contrary to the existing practice that the Commissioner was aware of through prior compliance activity in that industry and referred to in the guidance material on the ATO website.*

58. *In these circumstances, it would be appropriate for the Commissioner to not take action to apply the ATO view of the law in past years or periods. The ruling would only apply prospectively. This is because the ATO was aware of the existing practice through audit activity and contributed to the continuation of the practice by referring to it in guidance material on the website.*

Example 2 – General industry practice established

59. *The ATO issued a draft public ruling in relation to a particular issue.*

60. *Prior to the publication of the draft ruling, the ATO published a fact sheet on the ATO website which contained a view about an industry practice that had been developed. The view outlined in the factsheet was contrary to that expressed in the draft ruling. In addition, contrary views were also expressed and recorded in the minutes of previous National Tax Liaison Group meetings. The taxpayers in the relevant industry adopted the view made public by the ATO.*

61. *As a result of the actions by the ATO in publishing the documents containing the contrary view, which provided clear written evidence of the practice, it would be appropriate for the Commissioner to not take action to apply the ATO view of the law in past years or periods. This is because the ATO contributed to and facilitated the development of the prior industry practice.*

Example 3 – Prior ATO view, tax implications of the arrangement entered into by the taxpayer will not take effect for several years after the view is published

62. *The ATO identified a need to issue a public ruling in relation to the application of a provision of tax law to arrangements undertaken by taxpayers that involved long term commitments. In these circumstances taxpayers would enter into a contract in Year 1 but the tax implications of the arrangement, which are to be addressed in the ruling, would not apply until Year 5. There was a previous ATO ruling addressing a more general point which contributed to the taxpayers taking a different view in relation to the issues involved in the particular arrangements which were the subject of the new ruling.*

63. *Due to the nature of the arrangements involved, when the final ruling was issued, it was determined that the views expressed should be applied only for arrangements entered into after the date of publication of the ruling. It would not apply to arrangements that had already been entered into even though the tax implications of those arrangements would arise after the new view was published.*

64. *This approach was adopted because it was considered that taxpayers who entered into these contracts before the ATO view was expressed would have had a reasonable argument that the tax implications of the arrangement would have been different based on the previous ATO ruling. Taxpayers may not have entered into the arrangements had they known that there would be different tax implications. This is despite the fact that the tax implications would not arise until some time after the new view was published.*

65. *This approach was considered to be appropriate in these circumstances because the ATO facilitated or contributed to the taxpayers' view of the law in relation to the contracts that had already been entered into. Specifically, the ATO accepted that because of the way the earlier more general ruling was worded it could be interpreted in a manner consistent with the approach taken by taxpayers. As a result, the ATO determined that the most appropriate approach to adopt in these circumstances would be to ensure that the views expressed in the more specific ruling applied only in relation to arrangements entered into after the publication of the ruling.*

Example 4 – Existing industry practice not challenged within a reasonable timeframe

66. *In 2010, the ATO published an ATO ID on a GST issue in which the view expressed was contrary to a practice that had been developed by the industry and had existed since the introduction of the GST in 2000. The ATO became aware of the existing practice across the industry through compliance activities conducted in 2005 but did not take steps to challenge or express a contrary view or any concerns about the practice.*

67. *In this case it would be appropriate for the Commissioner to not take action to apply the ATO's view of the law in past years or periods because the ATO contributed to the industry practice. This is because the ATO became aware of the practice several years earlier but did not challenge it within a reasonable timeframe.*

Examples of cases where it would be appropriate to take action to apply the ATO view of the law in past years or periods

Example 5 – Law unclear, no ATO view

68. *The ATO decides to issue a public ruling in relation to an issue. The ATO had not previously published a view on this issue. The ATO was not aware of any existing taxpayer or industry practices in relation to the issue. There are two alternative interpretative views in relation to this issue. The ATO publishes a discussion paper which sets out both views and identifies a preferred view. It is made clear in the discussion paper that the views expressed are not binding and are for discussion purposes only.*

69. *As part of preparing the public ruling, the matter is considered by the Public Rulings Panel. Both views are carefully considered by the Panel, however it is decided that the alternative view in the discussion paper (that is, the view other than that which the ATO initially preferred) should now be the better view. The alternative view becomes the ATO view expressed in both the draft and final rulings.*

70. *In these circumstances it would be appropriate for the Commissioner to determine that the view should apply both prospectively and in relation to past years or periods because the ATO was not aware of any existing taxpayer or industry practices and the ATO did not contribute to the adoption of any such practices. The preferred view in the discussion paper is not binding on the Commissioner. The alternative view was outlined in order to facilitate resolution of the issue. The fact that the ATO had not previously publicly stated a view on the issue and the ruling has been issued to clarify uncertainty in circumstances in which the ATO knew of no existing taxpayer or industry practices means that the ruling can have both a past and future application.*

Example 6 – Audit issue, no existing practice

71. *The ATO conducted an audit of a taxpayer and identified that the taxpayer had taken a particular approach to the application of the law in relation to a specific issue that in the ATO's view is incorrect. The ATO amended the taxpayer's assessment in accordance with the ATO's view. At the time the issue was identified the ATO had no reason to consider that there was a significant risk of the approach being adopted by taxpayers more generally or it becoming an industry practice and so no further compliance action was taken in relation to this issue across the relevant industry.*

72. *A year later, the ATO gathered evidence that the approach adopted by the taxpayer is being applied more broadly across the industry. The ATO decides to undertake compliance activity in relation to high risk taxpayers in the industry. The Commissioner publishes a document on the ATO website indicating that compliance activity in relation to this issue is being undertaken. As a result of the audits it was discovered that there was a common misunderstanding across the sector and the views that taxpayers were adopting were contrary to the ATO view.*

73. *In this case it would be appropriate for the ATO to apply its view both prospectively and in relation to past years or periods. The fact that the ATO identified the issue in relation to a particular taxpayer but took no specific compliance activity in relation to the industry at the time or published an ATO view does not mean that the ATO can be considered to have facilitated or contributed to the development of the practice by taxpayers more generally.*

Example 7 – Clarification of ATO view

74. *Following publication of an ATO ID, there was some uncertainty amongst taxpayers as to whether the ATO ID applied to particular arrangements. As a result of this uncertainty, the ATO issued a public ruling which was consistent with the view in the ATO ID but clarified the ATO view by explaining how the principles applied to the particular arrangements.*

75. *The ATO view expressed in the final public ruling is consistent with the view set out in the earlier ATO ID. In this case it would be appropriate for the ATO to apply its view both prospectively and in relation to past years or periods. This is because the ATO did not facilitate or contribute to taxpayers taking a different view. The public ruling merely clarifies the view expressed in the ATO ID.*

Example 8 – ATO view of an arrangement sought to be applied to different set of facts

76. *A promoter applied for a product ruling on the way in which the tax laws applied to a particular investment scheme (Scheme 1). After the product ruling was issued, the ATO conducted compliance activities in relation to a particular industry. It was discovered that a different investment scheme (Scheme 2) was being marketed to taxpayers on the basis of the product ruling for Scheme 1. The ATO did not agree with this view and considered that Scheme 2 was materially different to Scheme 1.*

77. *The ATO discovered that a large number of taxpayers had invested in Scheme 2 and had applied the view of the law which was marketed to them. It was decided that it would be appropriate to undertake compliance activity in relation to the investors in Scheme 2.*

78. *In these circumstances, it is appropriate for the Commissioner to apply the ATO's view of the law in relation to past years or periods. This is because the ATO did not contribute to the taxpayers' view of the law in relation to Scheme 2. The product ruling only applies in relation to Scheme 1 but had been used inappropriately by the promoter to encourage taxpayers to enter into Scheme 2 which the ATO considered was different.*

Example 9 – No ATO view, taxpayer attempting to establish industry practice

79. *A taxpayer was selected for audit in relation to a particular issue. There was no existing document setting out the ATO's view on this issue.*

80. *The taxpayer advised that they had been applying their view of the law for several years and their returns had not been challenged. The taxpayer also advised that they understood that the ATO accepted the taxpayer's view because they had spoken to an officer from the ATO on one occasion several years ago and the tax officer did not identify that the ATO would have any concerns if this approach was adopted. The taxpayer did not apply for a private ruling in relation to this issue.*

81. *In these circumstances, it is considered that the taxpayer did not provide sufficient evidence to establish that the ATO contributed to or facilitated the taxpayer's view. A single discussion with a tax officer and the fact that the taxpayer's prior years returns were not subject to audit is not sufficient. As a result, in this case it would be appropriate for the ATO's view of the law to be applied in relation to past years or periods.*

Subject references	
Legislative references	ITAA 1936 8 ITAA 1936 45B TAA 1953 TAA 1953 8AAG TAA 1953 Sch 1 284-75(2) TAA 1953 Sch 1 284-75(5) TAA 1953 Sch 1 284-215 TAA 1953 Sch 1 284-224 TAA 1953 Sch 1 298-20 TAA 1953 Sch 1 357-60 TAA 1953 Sch 1 357-70 TAA 1953 Sch 1 358-10(1) TAA 1953 Sch 1 358-20(3) TAA 1953 Sch 1 361-5 SGAA 1992 SGAA 1992 43 SISA 1993 SISA 1993 42A(5)(b) FMAA 1997 44 FMAA 1997 44(2)
Related public rulings	TR 92/20 TR 2006/10 MT 2008/1 TD 2011/19
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Case references	
Other references	Explanatory Memorandum to the Tax Laws Amendment (Improvements to Self Assessment) Bill (No. 2) 2005 Review into delayed or changed Australian Taxation Office views on significant issues
File references	1-27NI4Q2
Date issued	28 July 2011
Date of effect	28 July 2011
Other Business Lines consulted	

Appendix A – Steps involved in determining whether to take action to apply the ATO view of the law only on a prospective basis

