PS LA 2011/27 - Determining whether the ATO's views of the law should be applied prospectively only

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Australian Taxation Office

PS LA 2011/27
Determining whether the ATO's views of the law should be applied prospectively only

This Law Administration Practice Statement sets out the matters that you should take into account in determining whether to apply the ATO view of the law prospectively only.

This practice statement is an internal ATO document, and is an instruction to ATO staff.

Taxpayers can rely on this practice statement to provide them with protection 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.

1. What this practice statement is about

We apply the ATO's view of the law in undertaking compliance activities and in providing interpretative advice or guidance, including a precedential ATO view document such as a public ruling or ATO interpretative decision (ATO ID).

This practice statement outlines procedures you should follow in determining whether there are circumstances that would make it inappropriate to apply the ATO view in relation to past years or periods.

2. Applying the ATO view of the law – general principles

The law operates from the date of effect of the relevant legislation, and thus we will usually apply our view of the law from this date (for exceptions, see section 12 of this practice statement).

However, in all instances you should consider whether there are circumstances which would make it appropriate to not take action to apply the ATO view of the law in past years or periods.

This practice statement outlines those circumstances, but they are not exhaustive, and are not intended to limit the Commissioner's powers. No one factor by itself is conclusive, and you need to consider and weigh up all the factors and circumstances in making your decision.

This practice statement does not purport to bind anyone in law to act contrary to the provisions of any statute. In particular, any assessment (including an amended assessment) of a taxpayer's liability must be based on the law as the ATO understands it to be having regard to any relevant case law, and not on any other basis.[1]

The same principle applies if the ATO is making a decision on an objection, issuing a private ruling or making submissions to a court or tribunal on the relevant point.[2]

It is preferable that a decision on whether or not to apply the ATO view of the law in relation to past years or periods be made as early as practicable in any compliance process. However, you may make such a decision at any time before issuing an assessment (including an amended assessment). This may result in the ATO declining to re-assess the taxpayer.[3]

Pattern of ATO conduct in relation to a single taxpayer

For the most part, this practice statement discusses ATO behaviour in relation to taxpayers generally, or to a class of taxpayers. However, a pattern of ATO conduct in relation to a single taxpayer might raise considerations for that taxpayer similar to those dealt with in this practice statement.

One relevant consideration in such a case would be the desirability of treating taxpayers in comparable situations consistently. This might need to be balanced against the desirability of avoiding unfair treatment in the particular circumstances of individual cases.

In case of a dispute, it would be appropriate to follow the procedure set out in section 11 of this practice statement.

[1] See *Macquarie Bank Limited v. Commissioner of Taxation* [2013] FCAFC 119 (*Macquarie Bank*) at [11]. This principle is subject to exceptions created by the legislation itself, such as where legislation expressly gives the Commissioner discretion to determine a particular amount, or where a statutory time limit or a binding ruling applies.

[2] This requirement does not prevent the ATO from taking, by the accepted principles of statutory interpretation, a particular view of the law (or of its application) that is reasonably open in cases where more than one view appears to be reasonably open, having regard to any applicable case law. See *Macquarie Bank* at [11].

[3] 'It may be accepted for the purposes of argument ... that the Commissioner's power of general administration ... permits the Commissioner 'to decline to consider re-assessing, or to decline to in fact re-assess, a taxpayer': *Macquarie Bank* at [11].

3. Applying the ATO view of the law – prospectively only

In deciding whether there are circumstances which would make it appropriate to not take action to apply the ATO view of the law in past years or periods, you must:

(a) consider whether previous ATO publications and conduct could be reasonably seen as conveying a different view of the law

(b) consider relevant factors in deciding whether the ATO will not take action to apply its view of the law to past years or periods.

These are outlined further in sections 4 and 5 of this practice statement.

4. Consider previous ATO publications and conduct

You must start by researching whether any ATO publication, product or evidence of ATO conduct could be reasonably seen as conveying a different view of the law (that is, different to the view now held) to taxpayers generally, or to a particular class or industry group.

At a minimum, you should search ATOlaw for advice we have issued on the subject, and as appropriate, other information such as the guidance we have provided on the issue on ato.gov.au. In appropriate cases, you should also speak with external advisors or industry representatives, and internal ATO experts, who might have particular knowledge of the history of the ATO's dealings with the relevant industry or taxpayer group.

5. Consider relevant factors

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

Main factors

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

(iii) whether a general administrative practice[4] 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[5] and the time taken to finalise its view.

Whether or not an industry practice exists is discussed in section 6 of this practice statement.

Overriding factors in individual cases

If:

- there is evidence of fraud or evasion in a particular case, or
- tax avoidance is involved

these will override any decision that has otherwise been made to apply the ATO view of the law prospectively only. This will not apply however, where there was an administrative practice that an anti-avoidance provision did not apply in a particular factual context.[6]

6. Is there an alternative view or industry practice?

To determine whether an industry practice exists, you need to evaluate any evidence that might support the practice, such as published documents on an industry website, academic or conference papers, speeches or minutes from industry forums, ATO publications referring to the industry practice. The publication of a single document may not be sufficient to establish industry practice.

Industry views can be adopted by taxpayers generally, or a class of taxpayers. They **do not** apply to views adopted by a single taxpayer.

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, you should consult with relevant industry stakeholders, usually through the relevant ATO forum for the industry concerned.

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[4] For further information about general administrative practice refer to TR 2006/10 and TD 2011/19.

[5] One way the ATO may make taxpayers aware that we are challenging a position or practice is by publishing a Taxpayer Alert on ato.gov.au.

[6] For further information on fraud, tax evasion and tax avoidance see: PS LA 2008/6 for guidance in determining whether there has been fraud or evasion, PS LA 2005/24 for information on the application of the general anti-avoidance rules, PS LA 2008/10 for information on the application of section 45B of the *Income Tax Assessment Act 1936* to share capital reductions.

To facilitate the timely identification of areas of uncertainty and potential contention, we also encourage tax advisers and taxpayers to bring issues to the ATO's attention, including in income tax returns, and discuss these with us.

If your research leads you to determine that no different industry practice exists, or if there is one, that the ATO has not facilitated or contributed to that practice, then the onus is on taxpayers or their representatives to provide evidence to the contrary.

Circumstances in which we have facilitated or contributed to the development of taxpayers' views or an industry practice

In the following circumstances, you should consider that we have contributed to the development of taxpayers' views or an industry practice:

- If any of our published material, including on ato.gov.au, accepts an industry practice regardless of how widely documented that industry practice is otherwise.
- If there is 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.
- If there is evidence (such as ATO publications, transcripts of speeches or minutes of ATO forum meetings) that the ATO was aware of the practice, had conducted a series of audits in that industry and decided 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.

Circumstances in which we have not facilitated or contributed to the development of taxpayers' views or an industry practice

In the following circumstances the ATO will not be considered to have facilitated or contributed to the development of taxpayers' views or an industry practice:

- Merely providing a view in, for example, a single private ruling or an audit, or not publishing a view on the issue – although that may indicate a wider practice or view of the law.
- 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.
- Preliminary views provided during the course of an audit, or in preparing a ruling if the ATO later changes its view or position.
- Preliminary views we may provide on the design of law changes.
- In the context of self-assessment, simply issuing assessments consistent with the information returned by taxpayers in a particular industry.

7. Seeking assistance from the Tax Counsel Network

Where an existing ATO view or general administrative practice would result in an outcome that is incorrect or unintended, or because there is a significant alternative view, assistance must be sought from the business line and, if the level of risk warrants it, from the Tax Counsel Network.[7]

8. Approval for decisions made in relation to applying the ATO view of the law

Approval of a decision not to take action to apply the ATO view in past years or periods must be made for:

- A public ruling (other than a class or product ruling), by:
  - a Deputy Chief Tax Counsel or the Chief Tax Counsel. Where the Public Rulings Panel reviews a proposed public ruling it will also consider date of effect issues as part of its advice.
- Other products or activities (class or product rulings, ATO IDs or compliance activities), by:
  - an SES employee whose normal duties include making these types of decisions.

9. Approval for changing an existing ATO view or general administrative practice

Any change to a precedential ATO view requires the approval of a Deputy Chief Tax Counsel in the first instance who would escalate to the Chief Tax Counsel if appropriate.

10. Communicating the decision

If the ATO view is to apply only on a prospective basis, you must clearly state this, together with reasons, in the advice to, or communication with, the taxpayer.

[7] See Law Administration Practice Statement PS LA 2012/1 *Management of high risk technical issues and engagement of officers in the Tax Counsel Network*.

If the issue of whether the ATO view should apply only on a prospective basis was specifically raised during the preparation of the advice or otherwise raised in the course of conducting compliance activities (for example, if it was specifically addressed in correspondence between the taxpayer and the ATO or raised as an issue as part of a consultation process), you should also tell the taxpayer of the ATO's decision and reasons for the decision.

If the issue was not specifically raised and your research does not uncover any evidence of previous ATO publications or conduct conveying a different view, then in most circumstances you don't need to provide a written explanation as to why the ATO view will apply in relation to past years or periods.

11. What happens if the taxpayer does not agree with the decision?

A disagreement might arise between you and the taxpayer during a compliance process as to whether it is appropriate to apply the ATO view prospectively only. If this can't be resolved, you should refer the question for decision to appropriately senior ATO personnel in the Law Design and Practice Group (such as an Assistant Commissioner in the Tax Counsel Network) who has not previously been involved in the particular case. The taxpayer's representatives should be given a full opportunity to explain their position to this decision-maker. The Second Commissioner Law Design & Practice should be notified if the dispute persists beyond this stage.

Settlement of disputes is a specifically delegated power of general administration dealt with in the ATO Code of Settlement. The factors outlined in this practice statement may be relevant, among other considerations, in deciding whether a dispute can be settled. This includes cases in which an assessment has been issued.

12. Exceptions to the general rule that the law will apply from the date of effect of the relevant legislation

Periods of review

Under the self-assessment regime[8], taxpayer returns (including activity statements) are generally accepted at face value, subject to post-assessment audit or other verification by the ATO. Time limits that restrict the ability to amend assessments beyond set timeframes apply to both taxpayers and the ATO.

[8] The GST, luxury car tax, wine equalisation tax and fuel tax credits systems operated on a self-actuating basis until 30 June 2012. 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.

Rulings regimes

Where a taxpayer follows a public, private or oral ruling that applies to them the ATO is bound to assess them as set out in the ruling.[9] If the correct application of the law is less favourable to a taxpayer than the ruling provides, the ruling protects the taxpayer from the law being applied by the ATO in that less favourable way.

A public ruling usually applies to both past and future years and protects a taxpayer from the date of its application, which is usually 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.[10] However, this rule doesn't apply to an indirect tax public ruling or an excise public ruling.

Even if a taxpayer does follow a ruling, we may apply the law in a way that is more favourable for the taxpayer (provided that the time limits have not expired) where to do so is a correct application of the law. This may happen where the ATO subsequently decides that the ruling is incorrect and disadvantages the taxpayer.[11]

See Taxation Ruling TR 2006/10[12] for the ATO's approach to determining the date of effect of public rulings.

Administratively binding advice

PS LA 2008/3 explains that, in the interests of sound administration, the ATO's practice has been to provide administratively binding advice in a limited range of circumstances.[13]

Matters under the Superannuation Guarantee (Administration) Act 1992

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

The principles discussed in this practice statement are also relevant to decisions about 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 ATO also needs to take into account the interests of affected employees.

[9] See section 357-60 of Schedule 1 to the *Taxation Administration Act 1953* (TAA).
[10] See subsection 358-20(3) of Schedule 1 to the TAA.
[11] See section 357-70 of Schedule 1 to the TAA.
[12] 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 TR 92/20 (withdrawn).
[13] 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.

Matters under the Superannuation Industry (Supervision) Act 1993

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

Under paragraph 42A(5)(b) of the SISA, the Commissioner has the 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.[14]

13. Powers of general administration

The Commissioner needs to make decisions about the allocation of ATO resources to compliance and other activities that promote the efficient, effective, economical and ethical use of those resources. In doing so the Commissioner must still comply with the law.

In the present context, this concept means you must do more than a simple cost-benefit analysis of whether a given audit process is likely to result in recovering an amount of revenue that is greater than the cost of undertaking the audit. The Commissioner may and should give substantial weight to broader considerations, including the benefits to the tax system of administering the law in a way that promotes certainty and fairness in practice.

While the Commissioner can't use the powers of general administration to accept non-compliance with the law[15], 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. PS LA 2009/4 addresses the exercise of the Commissioner's powers of general administration, including a range of factors[16] the Commissioner will take into account in deciding whether to undertake compliance action in relation to prior years or periods.

14. Examples

The following examples illustrate how the ATO would apply the factors outlined in this practice statement. The examples are not intended to be exhaustive or prescriptive, they don't address the application and remission of penalties, and it is assumed that there was no evidence of tax avoidance, fraud or evasion.

Cases where it may be appropriate to apply the ATO's view of the law only on a prospective basis

Example 1 – ATO is aware of existing practice

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

Some years later, the ATO decided to issue a public ruling outlining its views on the application of the provision. The views in the draft and final public ruling were contrary to the existing practice that the ATO was aware of and to which it referred to in the guidance material on ato.gov.au.

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

Example 2 – general industry practice established after ATO published earlier and different view

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

Before the publication of the draft ruling, the ATO had published a contrary view to that taken in the draft ruling on ato.gov.au about an industry practice that had been developed. Contrary views had also been expressed and recorded in the minutes of previous National Tax Liaison Group meetings. The taxpayers in the relevant industry had adopted the view made public by the ATO before the draft ruling.

As a result of the actions by the ATO in publishing the documents containing the contrary view, which provided clear evidence of the practice, it would be appropriate for the ATO to not take action to apply the current ATO view of the law in past years or periods.

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[14] PS LA 2009/5 explains the weight to be given to the ATO's advice and guidance on SMSFs and the appropriate compliance action to be taken if a taxpayer has relied on this advice or guidance. See also PS LA 2006/19 for further guidance about the exercise of the discretion.

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

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

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

The ATO identified a need to issue a public ruling on the application of a tax law provision to arrangements undertaken by taxpayers that involved long term commitments. These involved taxpayers entering into a contract in year 1 but with the tax implications of the arrangement (which are to be addressed in the ruling), not applying until year 5.

A previous ATO ruling addressing a more general point contributed to the taxpayers taking a different view to that subsequently taken by the ATO.

Due to the nature of the arrangements, when the final ruling was issued, we applied it only to arrangements entered into after the date of publication of the ruling. It did 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.

We adopted this approach because 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.

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 they had already entered into. The ATO accepted that the earlier more general ruling could be interpreted in a manner consistent with the approach taken by taxpayers.

Example 4 – ATO did not challenge existing industry practice within a reasonable time

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

In this case it would be appropriate for the Commissioner not to take action to apply the ATO's view of the law in past years or periods because the ATO contributed to the industry practice by not challenging it within a reasonable timeframe.

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

Example 5 – law unclear, no ATO view

The ATO decides to issue a public ruling in relation to an issue. The ATO has not previously published a view on this issue and isn't aware of any existing taxpayer or industry practices in relation to it. There are two alternative interpretative views and the ATO publishes a discussion paper that sets out both views and identifies a preferred view. The discussion paper makes it clear that the views expressed are not binding and are for discussion purposes only.

As part of preparing the public ruling, the Public Rulings Panel considers both views. It decides that the alternative view in the discussion paper (not the view that the ATO initially preferred) is the preferred view. The ATO adopts the alternative view in both the draft and final rulings.

In these circumstances it would be appropriate for the ATO to apply the view both prospectively and retrospectively because it wasn't aware of any existing taxpayer or industry practices and did not contribute to the adoption of any such practices. The preferred view in the discussion paper was not binding on the ATO. The alternative view was outlined in order to help resolve the issue. As the ATO had not previously publicly stated a view on the issue and the ruling has been issued to provide certainty in circumstances in which the ATO knew of no existing taxpayer or industry practices, the ruling can have both a past and future application.

Example 6 – audit of individual taxpayer, no existing practice

In the course of an audit, the ATO determined that the taxpayer's approach to the application of the law on a particular issue was incorrect, and amended the taxpayer's assessment. At the time the issue was identified the ATO had no reason to believe 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 on the issue across the relevant industry.

A year later, having found that the approach adopted by the taxpayer was being applied across the industry, the ATO decided to undertake compliance activity in relation to high risk taxpayers in the industry, publicising this on ato.gov.au.

The subsequent audit activity revealed that there was a common misunderstanding across the sector and the views that taxpayers were adopting were contrary to the ATO view.

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 across 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

Following publication of an ATO ID, there was some uncertainty among taxpayers as to whether it applied to particular arrangements. Accordingly, the ATO issued a public ruling that was consistent with the view in the ATO ID but clarified how the principles applied to the particular arrangements.

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 retrospectively as the ATO did not facilitate or contribute to taxpayers taking a different view. The public ruling merely clarified the view expressed in the ATO ID.

Example 8 – attempts to apply ATO view of an arrangement to different set of facts

A promoter applied for a product ruling on how the tax laws applied to a particular investment scheme (Scheme 1). After the product ruling was issued, the ATO conducted compliance activities across 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.

The ATO discovered that a large number of taxpayers had invested in Scheme 2 and had applied the view of the law that was marketed to them. The ATO decided to undertake compliance activity in relation to the investors in Scheme 2.

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

Example 9 – no ATO view, taxpayer practice – lack of evidence that ATO had contributed to taxpayer view

A taxpayer was selected for audit in relation to a particular issue. There was no existing document setting out the ATO view on it.

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 a tax officer on one occasion several years previously and the tax officer did not indicate 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.

In these circumstances, we 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.

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