



PS LA 2015/3 - Approval process for the application of subsections 815-130(2) to 815-130(4) of the Income Tax Assessment Act 1997 (ITAA 1997)

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 This document has changed over time. This version was published on *26 February 2015*



Practice Statement Law Administration

PS LA 2015/3

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: Approval process for the application of subsections 815-130(2) to 815-130(4) of the *Income Tax Assessment Act 1997* (ITAA 1997)

PURPOSE: To provide guidance to ATO personnel on the abovementioned process.

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SCOPE

1. This practice statement provides guidance to ATO personnel on the approval process specified above where the Commissioner relies on subsections 815-130(2) to 815-130(4) of the ITAA 1997 to identify arm's length conditions in relation to cross-border transfer pricing.
2. All legislative references in this practice statement are to the ITAA 1997 unless otherwise stated.
3. This practice statement should be read in conjunction with Taxation Ruling TR 2014/6 *Income Tax: transfer pricing: the application of section 815-130 of the Income Tax Assessment Act 1997* which provides guidance in respect of the application of section 815-130.
4. This practice statement does not apply in instances where ATO personnel are merely re-pricing an entity's actual conditions in accordance with the 'basic rule' in subsection 815-130(1) rather than seeking to rely on one of the exceptions at subsections 815-130(2) to 815-130(4) to reconstruct or annihilate the actual commercial or financial relations for the purposes of identifying the arm's length conditions.

BACKGROUND

5. Subdivision 815-B was introduced by the *Tax Laws Amendment (Countering Tax Avoidance and Multinational Profit Shifting) Act 2013*, which inserted Subdivisions 815-B, 815-C and 815-D into the ITAA 1997 and Subdivision 284-E into Schedule 1 to the *Taxation Administration Act 1953*, with effect from 29 June 2013.¹ These Subdivisions ensure that Australia's transfer pricing rules better align with the arm's length principle and the internationally consistent transfer pricing approaches as set out by the OECD.²
6. Subsection 815-130(1) provides the 'basic rule' for the way in which an entity's arm's length conditions are to be identified, that is, that they be based on the commercial or financial relations in connection with which the actual conditions operate and have regard to both the form and substance of those relations. Subsections 815-130(2) to 815-130(4) ('the exceptions') provide exceptions to that rule depending on whether the form and substance of those relations is consistent, or on what independent entities dealing wholly independently with one another in comparable circumstances would have done, or would not have done. (See paragraph 29 of TR 2014/6).
7. The operation of the 'basic rule', the exceptions to that rule, the meaning of the terms in section 815-130 and its interaction with other parts of Subdivision 815-B are discussed in TR 2014/6.
8. Paragraph 30 of TR 2014/6 states that these exceptions operate automatically. There is no discretion with their application if the circumstances described in the exception(s) apply in relation to the actual commercial or financial relations. In particular, section 815-130 neither requires nor contemplates the existence of any other 'exceptional circumstances', nor any subjective analysis in this regard, before the exceptions apply. Rather, the exceptional circumstances required for their operation are strictly defined within these subsections.

STATEMENT

9. In considering whether any of the exceptions to the basic rule in section 815-130 may apply to an entity in a particular instance, ATO personnel must:
 - At first instance, notify the Internationals section of the Public Groups and International business line (PG&I) of the existence of the matter for tracking of such cases.
 - Engage relevant technical expert(s) as early as possible. In the case of the PG&I, the relevant technical experts in the Technical Leadership Group or Internationals section of PG&I. In the case of the Private Groups and High Wealth Individuals business line (PGH), the relevant technical experts in the Technical Excellence Services stream of PGH or those mentioned above for PG&I.
 - Raise the matter with the taxpayer and give them the opportunity to clarify the facts and address any concerns that the ATO may have.

¹ Section 815-15 of the *Income Tax (Transitional Provisions) Act 1997* provides that Subdivisions 815-B, 815-C and 815-D apply to income years starting on or after the earlier of 1 July 2013 and the day the *Tax Laws Amendment (Countering Tax Avoidance and Multinational Profit Shifting) Act 2013* received Royal Assent (being 29 June 2013).

² See paragraphs 2.1, 2.5, 2.16 and 3.2 of the Explanatory Memorandum to Tax Laws Amendment (Countering Tax Avoidance and Multinational Profit Shifting) Bill 2013 (EM) which accompanied the *Tax Laws Amendment (Countering Tax Avoidance and Multinational Profit Shifting) Act 2013*.

10. Engaging relevant technical experts as early as possible can assist ATO personnel in:
 - ensuring that the facts obtained are probative of the elements of the exceptions to the basic rule in section 815-130, and
 - facilitating consideration of the matters so as not to cause delays.
11. Prior to the adoption of any view by the ATO that one of the exceptions should apply in relation to an entity's actual commercial or financial relations, ATO personnel must seek approval to do so from a relevant Assistant Commissioner within their business line. For example, this means:
 - an Assistant Commissioner within the International section of PG&I for cases dealt with in PG&I
 - an Assistant Commissioner in the Technical Excellence Services or Engagement and Assurance Services streams of the PGH for cases dealt with in PGH, or
 - a Senior Tax Counsel in the Tax Counsel Network (TCN) in instances where the case has been referred to TCN in accordance with PS LA 2012/1 *Management of high risk technical issues and engagement of officers in the Tax Counsel Network* and the Enterprise Risk Management Framework.
12. Prior to any escalation to an SES officer for approval, ATO personnel must also:
 - Engage relevant technical experts within their business line as early as possible to assist in ascertaining whether the conditions for the application of any of the exceptions are satisfied and in facilitating the approval process.
 - Consistent with paragraph 9 of this practice statement, have raised the issue with the taxpayer and given them the opportunity to clarify the facts and address any concerns that the ATO may have.
13. In support of any request for approval, ATO personnel must provide to the relevant Assistant Commissioner the position paper or other such document setting out the views proposed in relation to, amongst other things, the application of any of the exceptions. ATO personnel are not required to prepare documents additional to those normally prepared in transfer pricing cases just to address these matters.
14. This document must contain a clear explanation of the reasons for the application of the exception(s), including how the condition(s) for the application of the exception(s) apply to the entity.
15. This process has been implemented with a view to ensuring that the exceptions to the basic rule in subsection 815-130(1) are applied correctly, consistently and in appropriate instances.

Amendment history

Date of amendment	Part	Comment
26 February 2015	All	First published.

Subject references	Transfer Pricing Actual conditions Arm's length conditions Arm's length principle Arm's length profits Comparable circumstances Cross-border test Multinational enterprise Organisation for Economic Co-operation & Development Tax treaties
Legislative references	ITAA 1997 ITAA 1997 Subdiv 815-B ITAA 1997 Subdiv 815-C ITAA 1997 Subdiv 815-D ITAA 1997 815-130 ITAA 1997 815-130(1) ITAA 1997 815-130(2) ITAA 1997 815-130(3) ITAA 1997 815-130(4) ITTPA 1997 815-15 TAA 1953 Sch 1 Subdiv 284-E Tax Laws Amendment (Countering Tax Avoidance and Multinational Profit Shifting) Act 2013
Related public rulings	TR 2014/6
Related practice statements	PS LA 2012/1
Other references	Explanatory Memorandum to the Tax Laws Amendment (Countering Tax Avoidance and Multinational Profit Shifting) Bill 2013
File references	1-64SWU3E
Date issued	26 February 2015
Date of effect	As above
Other business lines consulted	Private Groups and High Wealth Individuals, Tax Counsel Network.
Business line	Public Groups and International
ISSN	2651-9526

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