PS LA 2017/2 - Diverted profits tax assessments

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PS LA 2017/2
Diverted profits tax assessments

This Law Administration Practice Statement provides guidance to ATO staff on the administrative process of making a diverted profits tax assessment.

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

1. What is this practice statement about?

This practice statement provides guidance to ATO staff on the administrative process for making a diverted profits tax (DPT) assessment under section 155-5 of Schedule 1 to the *Taxation Administration Act 1953* (TAA 1953) through ATO initiated action and the processes that follow after such an assessment is made.

This practice statement and the processes outlined in it, have been developed in recognition of the seriousness of making a DPT assessment.

2. What should you do if you consider that the DPT may apply?

If you consider that there may be a DPT risk, you must first:

i. Obtain approval from the DPT specialist team to commence a DPT analysis and determine whether it is appropriate to notify the taxpayer that you are intending to conduct a DPT analysis.

ii. Refer the matter to the Tax Counsel Network (TCN).

Approval by DPT specialist team

If you consider that the DPT may apply, you must present the relevant facts and circumstances to, and obtain approval from, the DPT specialist team before proceeding to conduct a DPT analysis. Once you have approval you should engage TCN to work with you in undertaking the DPT analysis.

Consideration of DPT

With the assistance of the DPT specialist team and TCN, you should engage with the taxpayer to obtain information and discuss issues as appropriate. In conjunction with the DPT specialist team and TCN, you should then form a view as to whether the DPT applies based on the information available to you.

Where you form the view that the DPT applies, you must ensure that TCN's engagement is formalised in accordance with the usual procedures regarding the application of the rules in Part IVA of the *Income Tax Assessment Act 1936* (ITAA 1936).[1]

There are three steps which must be taken prior to making a DPT assessment (unless it is an exceptional case). You must:

i. Obtain endorsement from the DPT Review Committee.

ii. Seek advice from the GAAR Panel at an initial hearing.[2]

iii. Obtain Deputy Commissioner endorsement on the decision to make a DPT assessment.

See Appendix 1 for a process map for making a DPT assessment.

Each of the three steps is discussed further below.

DPT Review Committee

If, after conducting a DPT analysis, you and TCN are of the view that the DPT applies, you must obtain endorsement from the DPT Review Committee to refer the matter to the GAAR Panel for consideration for an initial hearing.

The DPT Review Committee will consist of an Assistant Commissioner from your business line, the Assistant Commissioner of the DPT specialist team and a TCN officer.

Initial GAAR Panel hearing

The GAAR Panel provides advice to decision makers in order to ensure that decisions made on the application of the DPT are objectively based and there is a consistency in approach to the various issues that arise in relation to the application of the DPT.[3]

The GAAR Panel may consider any aspect of the application of the DPT.

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[1] PS LA 2005/24 *Application of General Anti-Avoidance Rules* at paragraphs 14-17.
[2] PS LA 2005/24 at paragraph 28.
[3] PS LA 2005/24 at paragraph 24.

However, the GAAR Panel may be practically limited to the extent to which it can advise on issues involving complex or extensive evidentiary material. These limitations will be dealt with by the Chair on a case-by-case basis in line with normal practice.

The GAAR Panel will ordinarily include at least one non-ATO member, in line with normal practice.

Consistent with the preliminary GAAR panel process, the taxpayer (and/or a representative of the taxpayer) will not be invited to attend the initial GAAR panel hearing.[4]

The Chair of the GAAR Panel can decide not to have a referred matter considered by the GAAR Panel. However, the Chair would usually consult the GAAR Panel before making that decision.[5]

Deputy Commissioner endorsement

Based on advice from the GAAR Panel, you must, in consultation with the DPT specialist team and TCN, decide whether to make a DPT assessment.

If you decide that you wish to make a DPT assessment contrary to the advice of the GAAR Panel, you must first escalate the matter to the Chair of the GAAR Panel or the CTC, in accordance with usual procedure.[6]

The decision to make a DPT assessment is subject to endorsement by a Deputy Commissioner in your business line.

Once the Deputy Commissioner in your business line has provided endorsement, you must arrange for the notice of assessment to be issued to the taxpayer and also ensure that the liability is recorded on the appropriate system. This should be done in consultation with the DPT specialist team.

Streamlined process in exceptional cases

You and your Deputy Commissioner may consider that exceptional circumstances exist such that a DPT assessment should be made without requiring all or some of the steps above. This may be the case where delay could frustrate the application of the DPT to a particular taxpayer, or could result in a DPT assessment being unenforceable. For example, if there is a risk that a taxpayer will move assets offshore or liquidate an entity with the purpose of frustrating the DPT collection and recovery process, it may be necessary to act expeditiously.

A Deputy Commissioner will only authorise departure from the normal procedure after consultation with the GAAR Panel Chair or the CTC, in accordance with existing GAAR Panel practice.[7]

If you believe a streamlined process is appropriate in your case, you should speak to the DPT specialist team in the first instance.

3. What do you do after a DPT assessment is made?

Recovering the tax payable to the ATO

DPT is due and payable 21 days after you have given the taxpayer the relevant DPT notice of assessment.[8]

You should refer the matter to Significant Debt Management to instigate the commencement of debt collection procedures for any amounts that remain owing after the due date.

Issuing a DPT statement

You should issue a written statement outlining the basis upon which the Commissioner has applied the DPT to the taxpayer no later than 7 days after you have given the taxpayer the relevant DPT notice of assessment.

Period of review of DPT assessments

The period of review for a DPT assessment is 12 months from the day after the day the notice of the DPT assessment is given to the taxpayer, unless shortened or extended.[9]

The period of review gives the taxpayer a further opportunity to provide information to you relevant to their DPT assessment.

If you have not already done so, you should consider whether it is appropriate to refer your case to an officer from Review and Dispute Resolution (RDR). RDR may provide support on evidence and appeals processes, particularly if your case is likely to result in litigation.

GAAR Panel

During the period of review, you must refer your matter to the GAAR Panel for further hearing.[10] This must be

[4] PS LA 2005/24 at paragraph 31. Relevantly, paragraph 33 makes it clear that the GAAR Panel process does not provide a platform for a hearing as part of a quasi-judicial process of review.
[5] PS LA 2005/24 at paragraph 23.
[6] PS LA 2005/24 at paragraph 26.
[7] Refer paragraph 26 of PS LA 2005/24.
[8] Subsection 177P(3) of the ITAA 1936.
[9] Section 145-15 of Schedule 1 to the TAA 1953.
[10] Subject to the Chair's discretion: see PS LA 2005/24 at paragraph 23.

done whether or not you referred the matter to the GAAR Panel for an initial hearing before making the DPT assessment.

In accordance with normal GAAR Panel procedure, the taxpayer will usually be invited to attend the hearing and address the Panel. However, an invitation to attend the hearing may not be extended if the taxpayer has not co-operated with the ATO and given the ATO the requisite information.

In extending an invitation to the taxpayer, the Chair will request the taxpayer to provide a written submission (unless the taxpayer chooses to rely upon a written submission already made to the ATO).

Usually, the GAAR Panel hearing will take place towards the end of the 12 month review period when you have sufficiently considered all information provided by the taxpayer. You should contact the GAAR Panel Secretariat after issuing a DPT assessment to schedule a suitable time, and notify the taxpayer accordingly.

Where a taxpayer notifies the Commissioner of a shorter period of review that ends before the date of any scheduled GAAR Panel hearing for the matter, you must reschedule the GAAR Panel hearing unless it is not possible to do so.

Amending a DPT assessment

Based on the information available to you and any advice provided by the GAAR Panel, you must decide, in consultation with the DPT specialist team and TCN, whether or not to amend the taxpayer's DPT assessment.[11]

If the matter is not able to be considered by the GAAR Panel because of a shortened period of review, you must seek advice from the GAAR Panel Chair prior to amending the DPT assessment.

If you decide that an amendment is appropriate, you have until the end of the period of review to amend the DPT assessment. You must obtain your Deputy Commissioner's approval before you amend a DPT assessment.

If you decide not to amend a DPT assessment, you should notify the taxpayer in writing of your decision. You must obtain your Deputy Commissioner's endorsement to issue this notification.

[11] If you wish to amend a DPT assessment contrary to the advice of the GAAR Panel, you must first escalate the matter to the Chair of the GAAR Panel or the CTC, in accordance with usual procedure.

Extending the period of review

If you do not consider you can complete your examination of the taxpayer's circumstances within the period of review, you can seek an extension by:

- requesting the taxpayer's consent to extend the period of review[12], or
- where the taxpayer does not agree, applying to the Federal Court for an order to extend the period of review.[13]

You must seek the extension before the period of review has ended.

Refer your case to an officer from Review and Dispute Resolution for assistance in applying for the order.

Shortened period of review

A taxpayer can shorten the period of review for a DPT assessment by giving the Commissioner written notice specifying a shorter period.[14] The shorter period must end at least 30 days after the day on which the written notice is given to the Commissioner.[15]

If you are given such a notice and you have not yet completed your review of the taxpayer's DPT assessment, you must consider, in consultation with the DPT specialist team and TCN, whether to apply to the Federal Court for an order to maintain the full period of review.

The Federal Court will only grant such an order if it is satisfied that it was not reasonably practicable or it was inappropriate for you to complete the examination within the shorter period specified in the taxpayer's notice because of:

- any action taken by the taxpayer, or
- any failure by the taxpayer to take reasonable action.[16]

You must apply for the order within 30 days of receiving written notice from the taxpayer.[17]

You should, as a matter of priority, refer your case to an officer from Review and Dispute Resolution for assistance in applying for the order.

Objection and appeal rights

A taxpayer cannot object to a DPT assessment.[18]

[12] Subsection 155-35(4) of Schedule 1 to the TAA 1953.
[13] Subsection 155-35(3) of Schedule 1 to the TAA 1953.
[14] Paragraph 145-15(1)(b) of Schedule 1 to the TAA 1953.
[15] Paragraph 145-15(2)(b) of Schedule 1 to the TAA 1953.
[16] Subsection 145-15(3) of Schedule 1 to the TAA 1953.
[17] Paragraph 145-15(3)(c) of Schedule 1 to the TAA 1953.
[18] Subsection 145-20(1) of Schedule 1 to the TAA 1953.

After the period of review has ended, a taxpayer may appeal a DPT assessment to the Federal Court.[19] An appeal must be lodged with the Court within 60 days after the end of the period of review.[20]

Special rules apply regarding what evidence is admissible in a Federal Court appeal in relation to a DPT assessment. For further guidance, refer to the revised Explanatory Memorandum to the Treasury Laws Amendment (Combating Multinational Tax Avoidance) Bill 2017.[21]

4. What is the interaction between a DPT assessment and an income tax assessment for the same period?

DPT is a separate tax liability to income tax. A taxpayer may have a DPT assessment and an income tax assessment in respect of the same period. These assessments are not 'alternative assessments' as described in PS LA 2006/7 *Alternative assessments*.[22]

Before issuing a DPT assessment and during the period of review, you should monitor the progress of any related income tax assessment and specifically whether the taxpayer has exercised any review or objection rights in respect of that assessment. If there is a review or objection on foot, coordinate with the relevant case officer to ensure there is a mutual understanding of the taxpayer's overall tax position.

5. More information

For more information, see:

- PS LA 2005/24 *Application of General Anti-Avoidance Rules*
- Revised Explanatory Memorandum to the Treasury Laws Amendment (Combating Multinational Tax Avoidance) Bill 2017

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[19] Paragraph 145-20(4)(b) of Schedule 1 to the TAA 1953.
[20] Paragraph 145-20(4)(c) of Schedule 1 to the TAA 1953.
[21] Refer paragraphs 1.195-1.202 of the revised Explanatory Memorandum.
[22] PS LA 2006/7 at heading 1.

Appendix

Process map – making a DPT assessment

