

TR 2006/10DA - Draft Addendum - Income tax, fringe benefits tax and product grants and benefits: Public Rulings

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 This document has changed over time. This is a consolidated version of the ruling which was published on *6 April 2011*



Draft Addendum

Taxation Ruling

Income tax, fringe benefits tax and product grants and benefits: Public Rulings

Preamble

This publication is a draft for public comment. It represents the Commissioner's preliminary view about the way in which a relevant taxation provision applies, or would apply to entities generally or to a class of entities in relation to a particular scheme or a class of schemes.

You can rely on this publication (excluding appendixes) to provide you with protection from interest and penalties in the following way. If a statement turns out to be incorrect and you underpay your tax as a result, you will not have to pay a penalty. Nor will you have to pay interest on the underpayment provided you reasonably relied on the publication in good faith. However, even if you don't have to pay a penalty or interest, you will have to pay the correct amount of tax provided the time limits under the law allow it.

This draft Addendum is being issued as a consequence of the inclusion of indirect tax and excise rulings into the public rulings system following the enactment of *Tax Laws Amendment (2010 GST Administration Measures No.2) Act 2010*.

This draft Addendum also clarifies the scope of the Commissioner's power to rule and confirms the types of matters that the Commissioner can deal with in a public ruling.

It is proposed that TR 2006/10 be amended as follows:

1. Title

Omit 'Income tax, fringe benefits tax and product grants and benefits: '.

2. Paragraph 1

(a) After the first sentence; insert:

This Act implemented the Government's response to the recommendations made in the *Report on Aspects of Income Tax Self Assessment* (ROSA Report).

(b) After the paragraph; insert:

1A. This Ruling also outlines the inclusion of indirect tax and excise rulings into the system of public rulings following the enactment of *Tax Laws Amendment (2010 GST Administration Measures No. 2) Act 2010*. This implemented the Government's response to the Board of Taxation's *Review of the Legal Framework for the Administration of the GST* which recommended harmonising the indirect tax rulings system with the general rulings system.

3. Paragraph 2

(a) Omit the first sentence.

(b) After 'a reasonably arguable position'; insert 'in regard to income tax matters'.

4. Paragraph 3

After the paragraph, insert:

3A. Goods and Services Tax Ruling GSTR 1999/1 and Wine Equalisation Tax Ruling WETR 2002/1 have been withdrawn with effect from 30 June 2010. To the extent that the Commissioner's views relating to public rulings in those Rulings continue to apply under Divisions 357 and 358 of the TAA, they have been incorporated into this Ruling.

5. Paragraph 5

At the end of the paragraph, insert:

Where appropriate a public ruling can also cover matters such as the Commissioner's approach to discretions, risk management material, and 'safe harbours', but only where these matters are relevant to the application of the relevant provision. This is further discussed at paragraphs 16A to 16D of this Ruling.

6. Paragraph 8

At the end of the paragraph, insert:

8A. A public ruling deals with how a provision in the law applies to entities generally or to a class of entities.^{4A} A public ruling could not therefore provide advice about how a relevant provision applies to a specific entity. If a ruling is to deal only with how the law applies to a specific entity, it should be issued as a private ruling (see Taxation Ruling TR 2006/11 for an explanation of the private rulings system). Nevertheless, in the context of providing advice to a class of entities on the application of a provision, it is possible for a public ruling to include a matter that is relevant to only one of the entities in the defined class. Furthermore, a public ruling might also touch on issues that are specific to a particular entity in the context of providing advice to a broader class. For example, a class ruling issued to employees of a particular employer, might necessarily deal with matters concerning a scheme established by the employer. However, as the class ruling is provided for the employees, as a class, it would only bind the Commissioner in respect of those employees and not the employer.

7. Footnote 6

Omit the text; substitute:

See paragraph 39 of this Ruling and Law Administration Practice Statement PS LA 2008/3 for more information.

8. Paragraph 11

(a) Insert the heading:

What issues can be covered in a public ruling?

(b) Omit the final three dot points; substitute:

- indirect tax (including goods and services tax (GST), wine tax and luxury car tax (LCT));
- excise duty;
- the administration or collection of the above taxes, levies and duties;
- product grants or benefits mentioned in section 8 of the *Product Grants and Benefits Administration Act 2000* (including energy grants, cleaner fuel grants and product stewardship (oil) benefits) or the administration or payment of the product grants and benefits;

^{4A} Subsection 358-5(1).

- a net fuel amount, or the administration, collection or payment of a net fuel amount;
- a net amount or the administration, collection or payment of a net amount; and
- a wine tax credit, or the administration or payment of a wine tax credit.

9. Paragraph 14

(a) Omit 'ITAA 1936'; substitute '*Income Tax Assessment Act 1936* (ITAA 1936)'.

(b) Omit 'ITAA 1997'; substitute 'the *Income Tax Assessment Act 1997* (ITAA 1997)'.

10. Paragraph 15

After 'listed taxes'; insert ', duties, levies'.

11. Paragraph 16

Omit the paragraph; substitute:

16. Provisions dealing with penalties for false or misleading statements, late payment of taxes, or late lodgment of returns, are examples of provisions about the administration or collection of taxes. The same applies to provisions dealing with shortfall interest charge and general interest charge. Similarly, provisions dealing with, for example, franking credits and debits are about the administration or collection of franking tax.

16A. Where a relevant provision has a discretion, a ruling can set out the Commissioner's opinion on the way in which that discretion should be approached, for example setting out those factors that are relevant to the exercise of the discretion. As a matter of practice, the Commissioner's general approach to a discretion will often be set out in a law administration practice statement, rather than in a public ruling. In the context of a particular scheme, a ruling may set out how the discretion would be exercised in a specific instance. However, the ruling does not amount to the actual exercise of the discretion nor can the ruling be expressed in a way that would fetter the future exercise of the discretion in a particular case (see paragraph 36 of this Ruling).

16B. A public ruling can deal with any matter related to the application of a provision. Therefore, in addition to a public ruling dealing with the interpretation of a provision, it can include material about how the Commissioner administers the provision.^{13A} Potentially, a public ruling could extend to matters such as how the Commissioner would select taxpayers for audit, or how taxpayers should manage their tax risk, in the context of the particular provisions which are the subject of the ruling. However, as a matter of practice it would be rare for the Commissioner to include such material in a public ruling. The Commissioner would have regard to how a ruling on such matters might prejudice or unduly restrict his ability to fulfil his responsibility to properly administer the tax laws and his responsibilities under the *Financial Management and Accountability Act 1997*.

16C. Similarly, it is possible for a public ruling to deal with a practice developed by the Commissioner in relation to a particular provision that is authorised under the powers of general administration. For example, in certain limited circumstances, the Commissioner may decide that it is appropriate to accept a practical approach to compliance with a particular provision that may otherwise be onerous to comply with. This is sometimes called a 'safe harbour'. Whilst such a topic could be addressed in a public ruling, the Commissioner would need to consider whether this was appropriate in a given case being mindful not to unduly fetter his administrative powers. As a matter of practice, such a topic would usually be discussed in a law administration practice statement in the GA series rather than a ruling.

16D. Where a 'safe harbour' is specifically provided for by a relevant provision it may be the subject of a public ruling. An example is the provisions concerned with safe harbour debt amounts in Division 820 of the ITAA 1997.

^{13A} Paragraphs 3.22 and 3.49 of the Explanatory Memorandum to the Tax Laws Amendment (Improvements to Self Assessment) Bill (No. 2) 2005.

16E. The Commissioner also has the general administration of some Acts which do not contain provisions which are 'about' any of the taxes, levies and duties listed in section 357-55 of Schedule 1 to the TAA. An example is the *A New Tax System (Australian Business Number) Act 1999* (ABN Act),^{13B} which has general application extending beyond the administration and collection of any of the taxes levies and duties listed in section 357-55 of Schedule 1 to the TAA. So the Commissioner is not authorised to make binding public rulings about the ABN Act. However, it may be necessary to cover ABN Act issues in the course of providing a ruling on a relevant provision which is covered by the list in section 357-55 of Schedule 1 to the TAA, such as section 12-190 of Schedule 1 to the TAA (no-ABN withholding) which is a provision about the administration and collection of income tax. Consideration of these issues would fall under the scope of 'any matter' for the purpose of ruling on the no-ABN withholding provision, and is only binding in respect of that provision (also see the example in paragraph 12 of this Ruling).

12. Footnote 12

Omit the text; substitute:

Paragraph 3.22 of the Explanatory Memorandum to the Tax Laws Amendment (Improvements to Self Assessment) Bill (No. 2) 2005 and paragraph 2.12 of the Explanatory Memorandum to the Tax Laws Amendment (2010 GST Administration Measures No.2) Bill 2010.

13. Paragraph 17

Insert the heading:

How are public rulings made?

^{13B} Subsection 28(4) of the ABN Act provides that the Act is taken to be one that the Commissioner has the general administration of.

14. Paragraph 21

After the paragraph, insert:

21A. An indirect tax ruling in force immediately before 1 July 2010 under section 105-60 of Schedule 1 to the TAA that is labelled as a public ruling or was notified by a notice in the *Gazette* is treated from 1 July 2010 as if it were a public ruling under Division 358 of Schedule 1 to the TAA.^{18A} This means that indirect tax rulings that the Commissioner published before 1 July 2010 in the formal public rulings series are treated as public rulings under Division 358. So too are advices on the application of indirect tax laws published by the Commissioner, for example on www.ato.gov.au, before 1 July 2010 where they are labelled as public rulings.

15. Paragraph 22

Omit the last two dot points; substitute:

- Product Rulings series (PR series);
- Product Grants and Benefits Rulings series (PGBR series);
- Fuel Tax Rulings series (FTR series);
- Fuel Tax Determination series (FTD series);
- Goods and Services Tax Rulings series (GSTR series);
- Goods and Services Tax Determination series (GSTD series);
- Miscellaneous Tax Rulings (MT series) that are labelled as 'legally binding';
- Wine Equalisation Tax Rulings series (WETR series);
- Wine Equalisation Tax Determination series (WETD series); and
- Luxury Car Tax Determination series (LCTD series).

16. Paragraph 24

Before 'practice statements', insert 'law administration '.

17. Footnote 19

Omit the text; substitute:

See Law Administration Practice Statement PS LA 1998/1 for information about the purpose and content of law administration practice statements.

^{18A} Section 105-60 formerly applied to indirect tax rulings, but was repealed by *Tax Laws Amendment (2010 GST Administration Measures No. 2) Act 2010*.

18. Paragraph 27

- (a) Omit 'how'; substitute 'a matter involved in the application of'.
- (b) Omit 'applies'.

19. Paragraph 28

Omit the paragraph; substitute:

28. For example, a publication that sets out the ATO's audit strategy for a particular class of taxpayers could not ordinarily be a public ruling. Material of this type could only form part of a public ruling, where the ruling concerned how a relevant provision applied, and the material about the ATO's audit strategy was in the context of the administration of that provision. As discussed in paragraph 16B of this Ruling, it would be rare for the Commissioner to include such matters in a public ruling.

20. Paragraph 36

After the paragraph, insert:

36A. In the context of indirect taxes, in circumstances where there is a GST group, GST joint venture or incapacitated entity, a ruling binds the Commissioner if, and only if, both the 'representative entity' and relevant 'member entity'^{22A} rely on the ruling. This rule only applies in relation to rulings which apply to the member entity and relate to:

- what would (but for the rules in the indirect tax law relating to GST groups, GST joint ventures or incapacitated entities) be a GST, wine tax or LCT-related liability or entitlement that the member entity has; and
- what is instead (because of those rules) a liability or entitlement that the representative entity has (or would have if, after the application of the rules, the liability or entitlement still existed).^{22B}

^{22A} The term 'member entity' is used in this context to refer to a member of a GST group, a participant in a GST joint venture or an incapacitated entity within the meaning given to those terms by the *A New Tax System (Goods and Services Tax) Act 1999* (GST Act). The term 'representative entity' is used to refer to the representative member of a GST group, the joint venture operator of a GST joint venture or the representative of an incapacitated entity (as the case requires).

^{22B} Subsections 357-60(5) and (6) of Schedule 1 to the TAA.

36B. For example, the Commissioner may be asked to rule on whether a particular supply made by a member of a GST group is subject to GST. The ruling that the Commissioner gives would satisfy paragraph 36A of this Ruling, as any GST that is payable on the group member's supply would (because of the grouping rules in the GST law)^{22C} be payable by the representative member of the group and not the group member. Accordingly, the Commissioner would only be bound by the ruling if both the group member and the representative member rely on the ruling. In order to rely on the ruling, the group member would need to treat its supply in accordance with the ruling and the representative member would need to act in accordance with the ruling when lodging its GST return for the tax period to which any GST payable would be attributable.

21. Paragraph 40

Omit the paragraph (including the heading); substitute:

The relevance of public rulings to whether a taxpayer has a reasonably arguable position in regard to income tax matters for the purposes of certain penalty provisions

40. Under the penalty provisions in Division 284 of Schedule 1 to the TAA, a taxpayer may be liable to pay an administrative penalty. In regard to income tax matters, the level of penalty depends, in part, on whether the taxpayer^{26A} treats a relevant provision as applying to a matter or identical matters in a particular way that was not reasonably arguable.

22. Paragraph 41

At the end of the paragraph, insert the footnote:

^{27A} For further information on whether a taxpayer has taken a reasonably arguable position refer to Miscellaneous Taxation Ruling MT 2008/2, and, in regards to public rulings, paragraphs 46 to 48 of that Ruling.

23. Footnote 29

Omit the text; substitute:

Section 358-15 of Schedule 1 to the TAA. Additionally, even if it is not withdrawn, an indirect tax or excise ruling that is a public ruling will cease to apply in relation to a particular taxpayer if an inconsistent private ruling is given to that taxpayer (paragraph 357-75(1B)(d) of Schedule 1 to the TAA).

^{22C} In particular, subsection 48-40(1) of the GST Act.

^{26A} This provision applies to a statement made by a taxpayer's agent as if it had been made by the taxpayer.

24. Paragraph 46

After 'withdrawn, ', insert 'and it is not an indirect tax or excise ruling, '.

25. Paragraph 47

Omit the paragraph; substitute:

47. The Commissioner has the flexibility to defer the withdrawal of a public ruling (including an indirect tax or excise ruling) where it would be inappropriate for the public ruling to be withdrawn on short notice.³⁶

26. Paragraph 50

Omit 'for schemes commencing on or after the date of effect of the new law, '.

27. Paragraph 52

After the paragraph, insert:

52A. To the extent inconsistent rulings deal with indirect tax or excise issues, the indirect tax and excise rules apply (refer to paragraphs 58A to 58C of this Ruling). To the extent inconsistent rulings deal with other issues, the rules for rulings other than indirect tax or excise rulings apply (refer to paragraphs 53 to 58 of this Ruling).^{37A}

28. Paragraph 53

Insert the heading:

Public rulings other than indirect tax or excise public rulings

29. Paragraph 58

After the paragraph, insert:

Indirect tax or excise public rulings

58A. If there are two inconsistent indirect tax or excise rulings that apply to an entity and both are public rulings then, to the extent of the inconsistency, that entity may rely on either of the rulings.^{38A}

³⁶ Section 358-20(2) of Schedule 1 to the TAA.

^{37A} Paragraph 2.32 of the Explanatory Memorandum to the Tax Laws Amendment (2010 GST Administration Measures No. 2) Bill 2010.

^{38A} Subsection 357-75(1A) of Schedule 1 to the TAA.

58B. If there are two inconsistent indirect tax or excise rulings that apply to an entity and at least one of the rulings is not a public ruling, then, to the extent of the inconsistency the later ruling is taken to apply from the later of the time it is made and the time (if any) specified in the ruling as being the time from which it begins to apply. The earlier ruling is taken to cease to apply at that later time.^{38B}

58C. Where there are three or more inconsistent indirect tax or excise rulings, the rules in paragraphs 58A and 58B of this Ruling should be applied to each combination of two rulings in the order in which they are made, to determine which ruling the entity can rely on.

30. Paragraph 60

Omit the paragraph (including the heading); substitute:

60. The Commissioner is preparing a practice statement on matters the Commissioner considers when determining whether the ATO view of the law should only be applied prospectively. The practice statement has been released in draft form as PS LA 3434. When finalised, ATO officers will consider the matters set out in that practice statement in determining the appropriate date of effect for a public ruling.

31. Paragraphs 61 to 69

Omit the paragraphs.

32. Paragraph 70

Omit the paragraph (including the heading); substitute:

Where prior general administrative practice exists and the ruling is not an indirect tax or excise public ruling

70. A public ruling that is not an indirect tax or excise ruling that relates to a scheme and that changes the Commissioner's general administrative practice (or conflicts with a previous private ruling) cannot apply to a particular entity if:

- the change is less favourable to the entity than the practice or ruling; and
- the entity has started to carry out the scheme.⁴⁰

^{38B} Subsection 357-75(1B) of Schedule 1 to the TAA.

⁴⁰ Subsection 358-10(2) of Schedule 1 to the TAA.

The Commissioner is preparing a Taxation Determination on the meaning of the term general administrative practice. The Taxation Determination has been released in draft as TD 2011/D4.

33. Paragraphs 71 to 74

Omit the paragraphs.

34. Paragraph 75

Omit 'taxation years'; substitute 'periods'.

35. Paragraph 76

- (a) Omit 'income years'; substitute 'periods'.
- (b) Omit 'taxation years'; substitute 'periods that are'.

36. Paragraph 79

(a) After 'reasonably arguable position', insert ' in regard to income tax matters'.

(b) Insert:

*Public rulings other than indirect tax
or excise public rulings* 53

Indirect tax or excise public rulings 58A

(c) After 'Where prior general administrative practice exists'; insert ' and the ruling is not an indirect tax or excise public ruling'.

37. Related Rulings/Determinations

Insert ' ; MT 2008/2'.

38. Previous Rulings/Determinations

Insert ' ; GSTR 1999/1; WETR 2002/1'.

39. Legislative references

Insert:

- ITAA 1997 Div 820
- TAA 1953 Sch 1 105-60
- TAA 1953 Sch 1 357-60(5)
- TAA 1953 Sch 1 357-60(6)
- TAA 1953 Sch 1 357-75(1A)
- TAA 1953 Sch 1 357-75(1B)

- TAA 1953 Sch 1 357-75(1B)(d)
- ANTS (ABN)A 1999 28(4)
- ANTS (GST)A 1999
- ANTS (GST)A 1999 48-40(1)
- Tax Laws Amendment (2010 GST Administration Measures No. 2) Act 2010
- Tax Laws Amendment (2010 GST Administration Measures No. 2) Act 2010 46(3)

40. Other references

Omit:

- Law Administration Practice Statement PS LA 2001/4

Insert:

- Explanatory Memorandum to the Tax Laws Amendment (2010 GST Administration Measures No. 2) Bill 2010
- Law Administration Practice Statement PS LA 2008/3
- Report on Aspects of Income Tax Self Assessment
- Review of the Legal Framework for the Administration of the GST, Board of Taxation

Your comments

You are invited to comment on this draft Notice of Addendum. Please forward your comments to the contact officer by the due date.

A compendium of comments is also prepared for the consideration of the relevant Rulings Panel or relevant tax officers. An edited version (names and identifying information removed) of the compendium of comments will also be prepared to:

- provide responses to persons providing comments; and
- publish on the ATO website at www.ato.gov.au.

Please advise if you do not want your comments included in the edited version of the compendium.

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It is proposed that when finalised, this Addendum will have effect both before and after its date of issue. To the extent that the Addendum concerns indirect tax and excise rulings, it will have effect from 1 July 2010.

Commissioner of Taxation

6 April 2011

ATO references

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