TR 2006/11 - Private rulings

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Taxation Ruling

Private rulings

Contents Para

LEGALLY BINDING SECTION:

What this Ruling is about 1

Previous Rulings 3

Ruling 4

Date of effect 62

NOT LEGALLY BINDING SECTION:

Appendix 1:

***Detailed contents list* 63**

This publication provides you with the following level of protection:

This publication (excluding appendixes) is a public ruling for the purposes of the *Taxation Administration Act 1953*.

A public ruling is an expression of the Commissioner's opinion about the way in which a relevant 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.

If you rely on this ruling, we must apply the law to you in the way set out in the ruling (or in a way that is more favourable for you if we are satisfied that the ruling is incorrect and disadvantages you, and we are not prevented from doing so by a time limit imposed by the law). You will be protected from having to pay any underpaid tax, penalty or interest in respect of the matters covered by this ruling if it turns out that it does not correctly state how the relevant provision applies to you.

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What this Ruling is about

1. This Ruling outlines the system of private rulings following the enactment of the *Tax Laws Amendment (Improvements to Self Assessment) Act (No. 2) 2005*. This Act implemented the government's response to the recommendations made in the *Report on Aspects of Income Tax Self Assessment*[A1] (ROSA Report). In respect of private rulings, that Act inserted new Divisions 357 (common rules) and 359 (private rulings) into Schedule 1 to the *Taxation Administration Act 1953* (TAA), the provisions of which are referred to in this Ruling.

1A. This Ruling also outlines the inclusion of indirect tax and excise rulings into the system of private rulings following the enactment of the *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 Goods and Services Tax*[A2], which recommended harmonising the indirect tax rulings system with the general rulings system.

[A1] Treasury (2004) *Report on Aspects of Income Tax Self Assessment*, https://treasury.gov.au/publication/p2004-aspects-income-tax-self-assessment.

[A2] The Board of Taxation (2008) *Review of the Legal Framework for the Administration of the Goods and Services Tax*, https://taxboard.gov.au/consultation/legal-framework-for-the-administration-of-the-gst.

2. This Ruling considers:

(i) what constitutes a private ruling;

(ii) what is a relevant provision;

(iii) what can be covered by a private ruling;

(iv) the status and binding effect of private rulings;

(v) who may apply for a private ruling and who is covered by it;

(vi) the form of application and information to be provided;

(vii) the making of a private ruling;

(viii) applications that do not have to be dealt with;

(ix) the effect of inconsistent rulings;

(x) revising private rulings;

(xi) the status of private rulings following a rewrite of the law;

(xii) the period for which a private ruling has effect;

(xiii) delays in making private rulings; and

(xiv) the review of private rulings.

2A. All further legislative references in this Ruling are to Schedule 1 to the TAA, unless otherwise indicated.

Previous Rulings

3. The following rulings were withdrawn on and from 5 April 2006. To the extent that the Commissioner's views in these Rulings apply in respect of the new provisions, they have been incorporated in this Ruling.

- Taxation Ruling TR 93/1 *Income tax and fringe benefits tax: private rulings*
- Taxation Ruling TR 97/16 *Income tax: status of taxation rulings following the income tax law rewrite*
- Taxation Determination TD 93/34 *Income tax and fringe benefits tax: is there a withdrawal of a private ruling by a later inconsistent public ruling if the year of income or fringe benefits tax year to which the private ruling relates has (a) already ended or (b) commenced but not yet ended*?
- Taxation Determination TD 95/45 *Income tax: self assessment: can a partnership make a valid application for a Private Ruling in terms of section 14ZAF of the Taxation Administration Act 1953(TAA)?*

- Taxation Determination TD 96/5 *Income tax: self assessment: can a person (the attorney) acting within the terms of a general power of attorney validly apply on behalf of the grantor of the power of attorney (the principal) for a private ruling on the way in which a tax law or tax laws will apply to the principal?*
- Taxation Determination TD 96/6 *Income tax: self assessment: can a person obtain a private ruling in terms of Part IVAA of the Taxation Administration Act 1953(TAA) for a year of income after the year ended 30 June 1992, where the question covered in the private ruling concerns depreciation deductions allowable in respect of plant acquired and used, or installed ready for use, before 1 July 1992?*
- Taxation Determination TD 96/16 *Income tax: self assessment: can a person obtain a private ruling under Part IVAA of the Taxation Administration Act 1953(TAA) on the question of whether that person is carrying on a business*?
- Product Grants and Benefits Ruling PGBR 2003/2 *Product grants and benefits: private rulings*.

3A. Goods and Services Tax Ruling GSTR 1999/1 *Goods and services tax: the GST rulings system* and Wine Equalisation Tax Ruling WETR 2002/1 *Wine equalisation tax: the WET rulings system* have been withdrawn with effect from 30 June 2010. To the extent that the Commissioner's views relating to private rulings in those rulings continue to apply under Divisions 357 and 359, they have been incorporated into this Ruling.

Ruling

What constitutes a private ruling?

4. A private ruling is a written expression of the Commissioner's opinion about the way in which a relevant provision applies or would apply to you. A private ruling must be in relation to a specified scheme.[1]

5. The private ruling can either be one that has been applied for or it can be a 'related ruling'. Section 359-45 permits the Commissioner to make the private ruling applied for a private ruling on a different provision, or to make an additional private ruling to that sought by you. An example of the former would be making a private ruling on a new provision of the law where you had sought a private ruling on the superseded provision. If the Commissioner makes an additional private ruling, it may be about the way in which another relevant provision would

[1] Section 359-5. See paragraph 15 of this Ruling for an explanation of what a 'scheme' is.

apply in relation to the scheme, or about how a relevant provision would apply to a related scheme.

6. There is no obligation on the Commissioner to make an additional private ruling. Where a private ruling request is very specific in its application to a scheme and a particular relevant provision, the Commissioner may give a private ruling that does no more than express an opinion on that particular relevant provision. For example, you might ask for a private ruling on whether an amount derived from the sale of an asset is assessable under section 6-5 of the *Income Tax Assessment Act 1997* (ITAA 1997).

6A. The Commissioner may give a private ruling that the amount is not assessable under section 6-5 of the ITAA 1997. This may occur even though the Commissioner might, if asked to consider the matter, consider that an amount (namely, a net capital gain calculated under Part 3-1 of the ITAA 1997) would be assessable as statutory income under section 6-10 of the ITAA 1997. However, because the ruling application did not draw attention to a possible alternative treatment, this question was not addressed.

7. Therefore, it is important for you to take care in the formation of the questions on which you are seeking a private ruling. For example, a question which seeks confirmation that an item of property sold during the year is a 'CGT asset' for the purposes of Division 108 of the ITAA 1997 may receive an affirmative private ruling. That private ruling does not represent confirmation that the capital gains tax provisions apply to the sale rather than, for example, section 6-5 of the ITAA 1997. If the author of the private ruling is aware of another provision that would apply to produce a different outcome, they would ordinarily advise you of this.

8. A private ruling in force immediately before 1 January 2006 under former Part IVAA of the TAA is treated as if it were a private ruling under Division 359, with effect from the day it was originally made.[2] Therefore the level of protection accorded by a ruling under former Part IVAA of the TAA will continue to apply to that ruling through Division 359. More generally, the provisions of Division 359 apply to private rulings made under former Part IVAA in relation to things done on or after 1 January 2006.[3] Therefore, for example, the objection, review and appeal rights applicable under Division 359 will apply to such a ruling if the relevant objection is made on or after 1 January 2006. Where inconsistencies arise between two rulings that were originally made before 1 January 2006, the rules set out in former sections 170BC to 170BDC and 170BF of the *Income Tax Assessment Act 1936* (ITAA 1936) will apply.[4] For more information about inconsistencies, refer to paragraphs 41 to 48 of this Ruling.

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[2] Item 29 of Part 3 of Schedule 2 to the *Tax Laws Amendment (Improvements to Self Assessment) Act (No. 2) 2005*.
[3] Item 32 of Part 3 of Schedule 2 to the *Tax Laws Amendment (Improvements to Self Assessment) Act (No. 2) 2005*.
[4] Item 30 of Part 3 of Schedule 2 to the *Tax Laws Amendment (Improvements to Self Assessment) Act (No. 2) 2005*.

8A. An indirect tax private ruling in force just before 1 July 2010 is treated from that time as if it were a private ruling under Division 359.[4A]

What is a relevant provision?

9. The Commissioner can issue rulings only on relevant provisions. Relevant provisions are provisions of Acts and regulations administered by the Commissioner that are about any of the matters listed in section 357-55.

10. Only provisions of Acts and regulations administered by the Commissioner are directly covered by section 357-55. Therefore, for example, the Commissioner cannot directly rule on trust law or the common law relating to the creation of a new trust. Such matters are outside the scope of the relevant provisions on which the Commissioner can directly rule.[5] However, the Commissioner may issue a private ruling on, for example, the capital gains tax consequences of the formation of a new trust. In making this ruling, the Commissioner might form a view that a new trust has or has not been created at common law for the purpose of coming to a view on the application of the capital gains tax provisions.[6] In such a case, that ruling would be binding in relation to the application of the capital gains tax provisions, even though it is premised on a particular view about whether a new trust has been formed at common law (which might even turn out to be incorrect). However, the view expressed about whether a new trust has been created at common law is not, by itself, a ruling. Therefore, it would not be binding on the Commissioner in a context outside of the application of the capital gains tax provisions to the particular scheme addressed by the private ruling and the entity it is expressed to apply to.[7]

11. The intention of the amendments implementing the ROSA Report is to enable the Commissioner to make private rulings on all the matters and circumstances in which private rulings have previously been made (for example, the extent of liability to income tax[8], or the way in which a discretion of the Commissioner would be exercised in determining that liability[9]). In addition, the Commissioner is authorised to make a private ruling to cover any aspect of the tax, levy, duty or entitlement covered by a relevant provision, including the collection and recovery of the tax, and its administration, or the administration or payment of a relevant grant or benefit.[10] This

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[4A] Subitem 46(2) of Schedule 2 to the *Tax Laws Amendment (2010 GST Administration Measures No. 2) Act 2010*.
[5] Subsection 359-5(1).
[6] Subsection 359-5(2).
[7] Subsection 357-60(1).
[8] Former section 14ZAF of the TAA.
[9] Former section 14ZAE of the TAA.
[10] Paragraph 3.22 of the Explanatory Memorandum to the Tax Laws Amendment (Improvements to Self Assessment) (No. 2) Bill 2005 (2005 EM) and paragraph 2.11 of the Explanatory Memorandum to the Tax Laws Amendment (2010 GST Administration Measures No. 2) Bill 2010 (2010 EM).

includes the ability to make a private ruling with respect to the value of anything where that is required for the making of the private ruling (see paragraphs 17 and 18 of this Ruling).

12. The intention to allow rulings to be given in a very wide range of circumstances has been reflected in the use of the word 'about' in section 357-55, which has a very broad meaning. The word 'about' is not defined in the ITAA 1936 or ITAA 1997 but takes its ordinary meaning of 'concerning', 'connected with', 'on the subject of' or 'relating to'.[11]

13. Therefore, a provision under which the extent of liability to the listed taxes, duties and levies is worked out is a provision 'about' them, as are provisions that are sufficiently relevant, or a necessary pre-requisite, to working out the liability. Similarly, a provision under which the extent of entitlement to the listed grants or benefits is worked out is a provision 'about' them, as are provisions that are sufficiently relevant, or a necessary pre-requisite, to working out the entitlement. Moreover, because private rulings are no longer restricted to provisions determining the extent of a liability or entitlement, the Commissioner may rule on how a provision applies to you even where the provision does not directly affect your liability or entitlement. Therefore, for example, a trustee may obtain a private ruling on whether a particular receipt of the trust is included in its net income, even though the private ruling may not affect the trustee's liability.

14. Provisions dealing with penalties for false or misleading statements, late payment of taxes, levies or duties or late lodgment of returns, are examples of provisions about the administration or collection of taxes, levies and duties. 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.

What can be covered by a private ruling?

15. A private ruling deals with a specified scheme. 'Scheme' is widely defined to mean 'any arrangement', or 'any scheme, plan, proposal, action, course of action or course of conduct, whether unilateral or otherwise'.[12] An 'arrangement' is defined to mean any arrangement, agreement, understanding, promise or undertaking, whether express or implied, and whether or not enforceable (or intended to be enforceable) by legal proceedings.[13]

16. A private ruling may deal with anything involved in the application of a relevant provision, including issues relating to liability, administration, procedure and collection, and ultimate conclusions of

[11] The Macquarie Dictionary, 2001, rev. 3rd edn, The Macquarie Library Pty Ltd, NSW and The Australian Oxford Dictionary, 1999, Oxford University Press, Melbourne.
[12] Subsection 995-1(1) of the ITAA 1997.
[13] Subsection 995-1(1) of the ITAA 1997.

fact.[14] This can include, where appropriate, matters such as how the Commissioner would apply discretions, 'safe harbours', and tax risk management policies in the context of the scheme. However, such matters can only be addressed to the extent that they are relevant to the application of the relevant provision. This is discussed in more detail in the context of public rulings in Taxation Ruling TR 2006/10 *Public Rulings* at paragraphs 16A to 16D. Additionally, the Commissioner is able to provide a private ruling which covers the value of anything where it is necessary in dealing with the application of the law.

17. Valuations in private rulings are covered by section 359-40. Where your private ruling request requires the determination of the value of anything (including any property, service or intangible asset), you can provide a valuation or ask the Commissioner for a valuation. In either case, the Commissioner may refer the valuation aspect of the private ruling request to a valuer, and you may be charged for this in accordance with the regulations.[14A] You will be advised if this occurs and when the valuer has completed the valuation work. The Commissioner is not obliged to obtain a valuation from a valuer. For example, if a valuation has been provided with the ruling request, the Commissioner may accept it without reference to a valuer if the valuation or a similar valuation has been previously provided and accepted by the Commissioner.

18. A private ruling request for the valuation of a gift or contribution for the purposes of Division 30 of the ITAA 1997 is not covered by section 359-40, as Division 30 has specific valuation requirements which are only applicable to that Division.[15] Providing a private ruling in these circumstances would generally constitute an unreasonable diversion of resources since a specific alternative mechanism for obtaining the valuation is provided by Division 30 of the ITAA 1997 and associated income tax regulations. Therefore, the Commissioner may decline to rule in these circumstances (see paragraph 39 of this Ruling).

The status and binding effect of private rulings

19. A private ruling binds the Commissioner if the private ruling applies to you and you rely on the private ruling.[16] In such a case, the Commissioner must not apply the provision covered by the private ruling in a way that is inconsistent with the private ruling to your detriment. However, if the scheme is not implemented in the way set out in the private ruling, or material facts were omitted from the private ruling application, or misleadingly or inaccurately stated, the private ruling does not bind the Commissioner.[17]

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[14] Subsection 359-5(2).
[14A] See section 68 of the *Taxation Administration Regulations 2017*.
[15] Subsection 359-40(5).
[16] Subsection 357-60(1).
[17] Paragraph 3.26 of the 2005 EM.

20. A private ruling applies to you if it is given in response to an application by you and the facts, assumptions or conditions set out in the ruling or accompanying documents are met.[18] A private ruling applies for the specified period, so long as the law to which it relates remains in force. If no time is specified and the ruling is not an indirect tax or excise ruling then the ruling applies from when it is made until the end of the income year or accounting period in which it started to apply. If no time is specified and the ruling is an indirect tax or excise ruling then it continues to apply until it is either replaced by a later indirect tax or excise ruling or it is revised.[18A] As discussed at paragraphs 51 to 53 of this Ruling, where the law is re-enacted or remade, the private ruling continues to apply insofar as the new law expresses the same ideas as the old law. If the law is repealed or amended to have a different effect, the private ruling ceases to apply.[19]

21. The reason why a private ruling ceases to apply if the law is amended to have a different effect is because a private ruling on the way the Commissioner considers a relevant provision applies or would apply according to the state of the law as it then exists says nothing about how a materially altered version of that provision applies. This is the case irrespective of whether the amendment is to the provision itself or to another provision which effects a change to the operation of the original provision (see paragraph 23 of this Ruling for an example of this).

22. That is not to say that any amendment to (or affecting) a provision would render a private ruling on that provision inoperative. It is only if the amendment produces an effect which is different from the effect of the provision prior to the amendment that the private ruling ceases to apply (and therefore ceases to bind the Commissioner). If the private ruling given under the original provision would have been the same if the amendment had been made before the private ruling is given, then the private ruling is still applicable. If the private ruling ceases to apply because of the amendment, then the private ruling cannot be relied on.

23. This point can be illustrated by way of the following example. Subsection 8-1(1) of the ITAA 1997 provides a deduction for certain losses or outgoings. However, the operation of subsection 8-1(1) is directly affected by Division 26 of the ITAA 1997, which sets out some amounts which cannot be deducted. If a private ruling is made about how the Commissioner considers subsection 8-1(1) applies to a particular type of outgoing, and an amendment were later made to Division 26 denying a deduction for such outgoings, then the private ruling can no longer apply. This is the case even though the wording of subsection 8-1(1) has not itself been changed (rather, the effect of the provision has been changed or amended by the amendment to Division 26). However, if the amendment to Division 26 is irrelevant to the issues addressed by the ruling, the ruling would still apply and

[18] Paragraph 3.24 of the 2005 EM.
[18A] See note to section 359-25 and also paragraph 2.55 of the 2010 EM.
[19] See note 2 in subsection 357-60.

would still bind the Commissioner. This is the case even if the ruling were later shown to represent an incorrect interpretation of the words of subsection 8-1(1).

24. You rely on a private ruling when you act (or omit to act) in accordance with it. An example of demonstrating reliance by omitting to act is omitting to lodge a tax return in response to a private ruling stating that you do not have assessable income in the relevant year and therefore do not need to lodge a return.

25. You may rely on a private ruling at any time unless prevented from doing so by a time limit imposed by a taxation law (for example, the period of review for your assessment). Also, you may change your mind and stop relying on a private ruling at any time. Further, having stopped relying on that private ruling, you may rely on it again at a later time, again subject to any applicable time limits. You stop relying on a private ruling by acting, or omitting to act, in a way that is not in accordance with the private ruling.[20]

26. Where you rely on a private ruling and the correct application of the relevant provision of the law actually gives a more favourable result for you, the Commissioner may nevertheless apply the correct view of the relevant provision as if you had not relied on the private ruling. For example, where the ruling determines an amount of a tax liability, the Commissioner will determine your liability in accordance with the private ruling unless the correct position under the law is more favourable to you than was set out in the private ruling. In such a case, the Commissioner may adopt the correct position even though you are relying on the private ruling. However, the Commissioner is not obliged to consider whether a more favourable outcome is available for you.[21] Rather, the Commissioner may accept your self-assessment without further investigation.

27. Because the Commissioner may apply an interpretation of the law that is more favourable for you, a private ruling binds the Commissioner in the following ways if you choose to rely on it:

- To the extent that a private ruling determines a tax liability, amount or an entitlement (or whether there is a tax liability, amount or an entitlement) under a relevant provision, the liability, amount or entitlement will be determined by the Commissioner in accordance with the private ruling. However, if the Commissioner concludes that the private ruling was wrong, they may adopt the correct position if it is more favourable than the private ruling.
- To the extent that a private ruling expresses the Commissioner's opinion on an ultimate conclusion of fact for the purposes of a relevant provision (such as whether you are a resident), the Commissioner is

[20] Section 357-65.
[21] Section 357-70.

bound to follow the expressed opinion, or may adopt the correct conclusion if that is more favourable.

- To the extent that a private ruling deals with matters of administration, procedure, collection or any other matter involved in the application of a relevant provision, the Commissioner must not act inconsistently with the private ruling to your detriment. However, they may adopt an interpretation that is more favourable where that is the correct position.[22]

Who may apply for a private ruling and who is covered by it?

28. You, your agent (which includes your tax agent) or your legal personal representative (which includes a person who holds a general power of attorney granted by you)[23] may apply for a private ruling about how a relevant provision applies to you.[24] Trustees may apply for private rulings about the affairs of the trust, and a partner (or other authorised person) may apply for private rulings for a partnership as agent of the partnership (and its partners).

29. The relevant provision must be capable of applying to you personally in order for you to be able to obtain a private ruling on it. So, for example, a private ruling on whether a person is considered to be an employee for the purpose of withholding under section 12-35 can be applicable only to the entity making the payment since that relevant provision applies only to the payer in determining the extent of their obligation to withhold instalments. The appropriate applicant for such a private ruling would therefore be the entity making the payment. The payee cannot apply for the ruling. On the other hand, a private ruling on whether a person is entitled to a deduction for car parking expenses having regard to subsection 51AGA(1) of the ITAA 1936 will require consideration of whether that person is an employee in the course of applying that provision to them. In this case, the person seeking the deduction can obtain a ruling on whether he or she is an employee for the purposes of that provision.

30. Usually the private ruling applies only to the entity in respect of whom the application was made. However, a private ruling given to a trustee in respect of the tax affairs of a trust also applies to:

- the beneficiaries of the trust if the ruling is not an indirect tax or excise ruling; and
- to any replacement trustee provided the ruling would have applied to the former trustee (which it would not have if, for example, the scheme in respect of which the private ruling is made is not materially the same as the scheme actually implemented).[25]

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[22] See paragraph 3.30 of the 2005 EM.
[23] See paragraph (c) of the definition of 'legal personal representative' in subsection 995-1(1) of the ITAA 1997.
[24] Subsection 359-10(1) and paragraph 3.67 of the 2005 EM.
[25] Section 359-30.

30A. An indirect tax ruling obtained by a member of a GST group, a participant in a GST joint venture, or an incapacitated entity may also apply to the representative member of the GST group, the joint venture operator of the GST joint venture or the representative of the incapacitated entity.[25A] The Commissioner will only be bound by such a ruling in relation to the 'member entity' and the 'representative entity' if both entities rely on the ruling by acting or omitting to act in accordance with the ruling.[25B]

30B. In the context of GST, the entitlement of a recipient of a supply to input tax credits, depends on the GST that is payable by the supplier. A private ruling issued to the supplier does not apply to the recipient of the supply. However, if it affects the treatment of the supply by the supplier who relies on it, it may correspondingly have an effect on the input tax credits that a recipient can claim.[25C]

31. You may withdraw your application for a private ruling (orally or in writing) at any time before the ruling is made. The Commissioner must provide written confirmation of the withdrawal.[26]

The form of application and information to be provided

32. An application for a private ruling must be in a form approved by the Commissioner.[27] You need not apply on a standard form (in the sense of pre-printed stationery or a template), provided the application contains all the information the Commissioner requires in an application in order to be able to make the private ruling. Application forms are available on our website. These forms detail the information that is required by the Commissioner in order to deal with requests for private rulings.[28]

33. If insufficient information is provided in the application, the Commissioner may consider further information is required in order to proceed. The Commissioner must ask for that information from you. You may also provide additional information after making the application. Where the Commissioner has asked you for additional information and it is not provided within a reasonable time, they may decline to rule (see paragraphs 39 and 40 of this Ruling).[29]

34. The Commissioner may also obtain additional information necessary for a private ruling from other parties, or make any

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[25A] Subsections 357-60(5) and (6); and see paragraphs 2.45 to 2.47 of the 2010 EM.
[25B] This is only the case, however, if the ruling satisfies subsection 357-60(6). A ruling which applies to the member entity and relates to its own indirect tax liability (as opposed to an amount that 'becomes' a liability of the representative entity under the indirect tax rules relating to GST groups, GST joint ventures or incapacitated entities) will not satisfy subsection 357-60(6). Accordingly, the Commissioner will be bound by a ruling of this type if the member entity alone relies on the ruling.
[25C] Subsection 357-60(3); and see paragraph 2.44 of the 2010 EM.
[26] Subsection 359-10(3).
[27] Subsection 359-10(2).
[28] See also Law Administration Practice Statement PS LA 2005/19 *Approved forms* for general information about approved forms.
[29] Sections 357-105 and 357-115.

assumptions that they consider to be the most appropriate in the circumstances. However, you must be informed of the additional information or assumptions that the Commissioner intends to use and have a reasonable opportunity to comment or respond.[30] Where disclosure by the Commissioner to you of any such additional information that is material to the outcome of the private ruling is not possible (for example, where disclosure would breach the confidentiality of the provider of the information), they may decline to rule (see paragraph 39 of this Ruling).

35. There will be circumstances where the application of a relevant provision to the particular scheme depends on a question of fact. For example, the application of many provisions depends on whether a business is being carried on. In such a case, you should ensure you have researched the factors that are relevant (for example, the factors described in Taxation Ruling TR 95/6 *Income tax: primary production and forestry*) and that the description of the scheme in the application contains sufficient information addressing all those factors (for example, the commercial viability of the activity).

36. Where the application is in respect of a proposed scheme, there is a real, practical risk in that differences may arise between the scheme dealt with by the Commissioner in a ruling and the scheme actually carried out. Where these differences are material, the private ruling given will not apply to the scheme as implemented (see paragraph 19 of this Ruling). In these circumstances, it may be possible to obtain another private ruling, which can be in respect of the scheme that is or was actually carried out.

The making of a private ruling

37. A private ruling is made by the Commissioner recording it in writing and providing a copy to you, either on paper or electronically.[31] A private ruling must state that it is a private ruling, specify the relevant scheme, and identify the entity to whom it applies, and the relevant provision to which it relates.[32]

38. Section 357-90 provides that the validity of a ruling is not affected merely by the fact that a provision relating to the form or the procedure for making it has not been complied with. Section 357-90 prevents, for example, the Commissioner asserting that a document clearly intended to be a private ruling is not in fact a private ruling merely because of a procedural or formal defect.

Applications that do not have to be dealt with

39. In the usual case where an application has been made in the approved form, the Commissioner is bound to make the private ruling. However, in the interests of allowing the Commissioner to focus

[30] Sections 357-110 and 357-120.
[31] Section 359-15.
[32] Section 359-20.

efforts on increasing certainty for entities in the most genuine and worthy cases, they may decline to rule in certain situations.[33] Situations where the Commissioner may decline to rule are as follows[34]:

- Where the Commissioner considers that making the ruling would prejudice or unduly restrict the administration of a taxation law. Examples include where:
  - the application is frivolous or vexatious or not seriously contemplated (such as a request where the scheme is merely hypothetical);
  - provision of a private ruling would not have any practical consequences for you (such as where a Product Ruling already applies to you, or where the transaction has already occurred in an income year for which the amendment period has expired);
  - you do not agree to pay the amount charged for a valuation[35];
  - the Commissioner considers that information provided by a source other than you is material to the outcome of the ruling, but disclosure of that information to you would breach tax secrecy provisions, privacy legislation or the confidentiality of the person providing the information (see paragraph 34 of this Ruling)[36]; or
  - making the private ruling would require an unreasonable diversion of the Commissioner's resources from other matters to which they must attend in the course of administering the taxation laws.

  The power to decline to rule in such situations recognises that the ATO is not in the business of giving advice as a purely academic exercise, or assisting unscrupulous people to provide doubtful tax planning advice, or allowing some entities to divert the ATO's resources to meet their needs to the detriment of others and the robustness of the system as a whole.[37]
- The matter is already being, or has been considered by the Commissioner for you. This includes where you already have a private ruling on the matter, where the matter has already been decided for the purposes of a

[33] Section 359-35 and paragraphs 3.77 to 3.85 of the 2005 EM.
[34] Subsection 359-35(2) and (3).
[35] See paragraph 3.81 of the 2005 EM.
[36] See paragraph 3.44 of the 2005 EM.
[37] See paragraph 3.82 of the 2005 EM.

Commissioner's assessment, where the matter is the subject of a tax audit of which you are aware and which will be decided by the audit, or the matter is the subject of an objection against an assessment.

- The matter is about how the Commissioner would exercise a power under a relevant provision and, because the appropriate course of action is for them simply to exercise the power or decline to exercise the power, they do that rather than issue a ruling. If you want the Commissioner to exercise a particular power under the law, this should normally be by way of asking them to do this rather than by seeking a private ruling. For example, you should normally ask the Commissioner for an extension of time to provide a required approved form under section 388-55 rather than seeking a ruling on the issue. This is to be distinguished from the situation where you are seeking a private ruling about how the Commissioner would exercise a discretion at a future time in relation to the scheme specified.

40. The Commissioner may also decline to rule where:

- they have asked you for additional information and it is not provided within a reasonable time (see paragraph 33 of this Ruling); or
- they consider that the correctness of the private ruling would depend on which assumptions were made about a future event or other matter.[39] [39AA]

40A. The Commissioner may decline to rule where they consider that it would not be reasonable to comply with the application, where the relevant provision to which the application relates is in respect of[39AB]:

- Australian IIR tax (income inclusion rule tax);
- Australian UTPR tax (undertaxed profits rule tax); or
- Australian DMT tax (domestic minimum top-up tax).

40B. The ability of the Commissioner to decline to rule under paragraph 359-35(2)(c) is broad.[39AC] Examples of when the

[38] [Omitted.]
[39] See the note in subsection 359-35(3).
[39AA] Assumptions about other matters may include, for example, an assumption regarding the application of financial accounting standards.
[39AB] Paragraph 359-35(2)(c).
[39AC] Paragraph 3.105 of the Explanatory Memorandum to the Treasury Laws Amendment (Multinational – Global and Domestic Minimum Tax) (Consequential) Bill 2024.

Commissioner may decline to rule under this provision include[39AD]:

- where the Organisation for Economic Co-operation and Development/G20 Inclusive Framework on Base Erosion and Profit Shifting (Inclusive Framework) has published guidance relating to the matter, which the government is planning on incorporating into domestic law but has not yet done so;
- where the matter relates to an issue that the Inclusive Framework has identified as requiring guidance, or for which it is drafting guidance and has yet to publish an agreed version of that guidance; or
- where the issuing of a ruling would require the Commissioner to consider how other jurisdictions apply their respective domestic tax laws.

The effect of inconsistent rulings

41. Where there are inconsistent rulings that both apply to you, section 357-75 sets out rules for determining which ruling may be relied upon, to the extent of the inconsistency. Rulings will not be inconsistent to the extent to which they apply to different schemes or to different time periods (such as different income years).

41A. To the extent inconsistent rulings deal with indirect tax or excise issues, the indirect tax and excise rules apply (refer to paragraphs 48A and 48B 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 42 to 48 of this Ruling).[39A]

Rulings other than indirect tax or excise rulings

42. As a general principle, you may always choose to rely on a public ruling that applies to you and may choose to rely on a private or oral ruling that specifically addresses your circumstances (provided the private or oral ruling applies to you, which it would not if it has been revised in time: see paragraph 49 of this Ruling). So, if there is an apparent inconsistency between a later applicable private ruling and an earlier public ruling, you may choose which ruling you wish to rely on. Similarly, if there is an inconsistency between two public rulings (including this Ruling and, for example, one of those rulings mentioned in paragraph 3 of this Ruling prior to their withdrawal), each of which applies to you, you may rely on either ruling.

[39AD] Paragraph 3.106 of the Explanatory Memorandum to the Treasury Laws Amendment (Multinational – Global and Domestic Minimum Tax) (Consequential) Bill 2024.

[39A] See section 357-75 and also paragraph 2.32 of the 2010 EM.

43. However, there are special rules which limit your ability to rely on a private ruling if it is inconsistent in some respect with a later public, private or oral ruling.

44. If the private ruling is inconsistent with a later public ruling, the earlier private ruling is taken not to have been made if, when the public ruling is made, the following two conditions are met:

(i) the income year or other period to which the rulings relate has not begun; and

(ii) the scheme to which the rulings relate has not begun to be carried out.[40]

45. This allows the correction of an erroneous private or oral ruling by the issue of a later public ruling, but only where you have not already entered into the scheme and the relevant income year or accounting period has not commenced. If you have already entered into the scheme, or the relevant income year or accounting period has commenced, then you may rely on either ruling (see paragraph 42 of this Ruling).

46. If an earlier private ruling is inconsistent with a later private or oral ruling, the earlier ruling is taken not to have been made if you informed the Commissioner of the existence of the earlier ruling when applying for the later ruling. If you did not inform the Commissioner about the earlier ruling, the later ruling is taken not to have been made.[41]

47. Where there are three or more inconsistent rulings, the rules in paragraphs 44 to 46 of this Ruling should be applied to each combination of two rulings in the order in which they are made, to determine whether any of the rulings are taken not to have been made, and then to determine which of the remaining rulings you can rely on.

48. These rules to resolve inconsistencies between rulings do not apply where both the inconsistent rulings were originally made before 1 January 2006. Rules set out in former sections 170BC to 170BDC and 170BF of the ITAA 1936 apply in such a situation.[42]

Indirect tax or excise rulings

48A. If there are two inconsistent rulings that apply to an entity and at least one of the rulings is a private 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.[42A]

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[40] Table item 3 of subsection 357-75(1).
[41] Table item 2 of subsection 357-75(1).
[42] Item 30 of Part 3 of Schedule 2 to the *Tax Laws Amendment (Improvements to Self Assessment) Act (No. 2) 2005*.
[42A] Subsection 357-75(1B) and see also paragraphs 2.28 and 2.29 of the 2010 EM.

48B. Where there are three or more inconsistent rulings, the rules in paragraph 48A 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 for a particular period of time.

Revising private rulings

Rulings other than indirect tax or excise private rulings

49. An existing private ruling may be revised by the Commissioner, but only where the scheme to which that original private ruling relates and the relevant income year or accounting period have not begun. Such a revision may be made whether or not there is an application for a revised private ruling.[43] Unless the revised private ruling specifies a different start date, it applies to you from the time it is made (that is, when a copy of it is given to you). The original private ruling no longer applies and therefore cannot be relied upon.

50. A private ruling can also be taken not to have been made where a subsequent inconsistent public ruling is made before either the scheme or the income year (or accounting period) relevant to the private ruling have started (see paragraph 44 of this Ruling).

Indirect tax or excise private rulings

50A. An existing indirect tax or excise private ruling may be revised by the Commissioner. Such a revision may be made whether or not there is an application for a revised private ruling.[43A] Unless the revised private ruling specifies a later start date, it applies to you from the time it is made (that is, when a copy of it is given to you). From that time the original private ruling no longer applies and therefore cannot be relied upon.[43B]

The status of private rulings following a rewrite of the law

51. Where a relevant provision is re-enacted or remade, an earlier private ruling is taken to be about the re-enacted or remade provision insofar as the new law expresses the same ideas as the old law.[44] However, if the law has been substantively changed, the part of the private ruling dealing with the changed law ceases to apply.

52. Therefore, for schemes commencing on or after the date of effect of the new law, you can continue to rely on existing private rulings which deal with the old law if the new law expresses the same ideas as the old law. If the old law has been replaced by a new law which does not express the same ideas, then the part of the private

[43] Section 359-55.
[43A] Section 359-55.
[43B] Subsections 359-55(4) and (5).
[44] Section 357-85.

ruling on that old law does not apply in relation to the new law. That is, that part of the private ruling will not apply to schemes entered into on or after, or extending beyond, the date of effect of the new law.

53. In deciding whether the new law expresses the same ideas as the old law, you can normally assume there has been no change in those ideas unless announced otherwise. Ways in which a change may be announced include:

- the explanatory memorandum, second reading speech, or other relevant extrinsic material relating to a Bill which is re-enacting or remaking the particular provisions;
- a tribunal or court decision (not under appeal) which makes it clear that there has been a change in ideas; and
- a public announcement by the ATO that there has been a change in ideas – for example, by way of a Taxation Ruling, Taxation Determination, press release or other ATO publication.

The period for which a private ruling has effect

54. A private ruling will usually specify the time it begins to apply and the time it ceases to apply. The specified start or end time of a private ruling may be before, when or after the private ruling is made. This time may be specified by reference to the occurrence of a particular event (for example, commencement of the relevant scheme). Where no date or event is specified, the private ruling applies from when it is made. If no end time is specified and the ruling is not an indirect tax or excise ruling it ceases to apply at the end of the income year or accounting period in which it started to apply.[45] If no end time is specified and the ruling is an indirect tax or excise ruling it continues to apply until it is either replaced by a later indirect tax or excise ruling or it is revised.[45A]

Delays in making private rulings

55. Where you have applied for a private ruling and the Commissioner has not made the ruling (nor declined to rule) within 60 days of the application being lodged, you may give a notice to the Commissioner to make the private ruling. You may lodge an objection if the Commissioner has failed to make a private ruling (or declined to rule) within 30 days after being given such a notice. In lodging this objection, you must also lodge your own draft private ruling.[46]

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[45] Section 359-25.
[45A] See Note to section 359-25, section 359-55 and the 2010 EM.
[46] Section 359-50.

56. Certain actions by the Commissioner within the 60-day period have the effect of extending that period, including:

- requesting further information from you;
- telling you about assumptions the Commissioner proposes to make or additional information that is proposed to be taken into account; and
- referring a valuation matter to a valuer.[47]

57. The effect of your own draft private ruling mentioned in paragraph 55 of this Ruling is as follows. The draft private ruling does not by itself have any effect. However, as a result of the objection, the Commissioner must either make a private ruling in the same terms as your draft, or make a different one.[48] If the Commissioner fails to do either of these within, in the usual case, 60 days of lodgment of the objection (for example, because further information is required to make the ruling and this has not been provided by you), the objection is taken to have been disallowed.[49] However, this deemed disallowance of the objection against the Commissioner's failure to rule does not mean that the draft private ruling lodged with your objection takes effect, or that you can have that draft ruling considered by the Federal Court or the Administrative Review Tribunal in any review or appeal against the disallowance.

The review of private rulings

58. You may object against a private ruling which applies to you if you are dissatisfied with it.[50] However there are three instances where a private ruling may not be objected against:

- where an assessment has been made in respect of the year of income or accounting period covered by the private ruling. In this situation you can have the matter dealt with in the private ruling reviewed by lodging an objection against the relevant assessment or amended assessment;
- where the private ruling relates to withholding tax or mining withholding tax that has become due and payable; and
- where the private ruling relates to excise duty or another amount payable in relation to the goods under an excise law and the Commissioner has made a decision about the excise duty, or other amount, payable in relation to those goods and the decision is reviewable under an excise law.

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[47] Subsection 359-50(2).
[48] See subsection 14ZY(1A) of the TAA for more information.
[49] Section 14ZYB of the TAA. Note that paragraph 14ZYB(1)(b) of the TAA specifies a different period within which the Commissioner must make the objection decision in certain circumstances.
[50] Section 359-60.

59. Where an objection against a private ruling is allowed to some extent, the private ruling is taken to have been altered in accordance with the objection decision once the period in which an appeal against, or an application for the review of, the decision may be made has ended without such an appeal or application being made.[51] If the objection is disallowed to any extent you may have the objection decision considered by the Federal Court or the Administrative Review Tribunal.[52]

60. In considering an objection against a private ruling, the Commissioner may consider additional information that was not considered at the time of making the private ruling. Where additional information will be considered and it comes from a source other than you, the Commissioner must tell you what this information is and give you a reasonable opportunity to comment or respond before allowing or disallowing the objection.[54]

61. However, if the Commissioner considers that the additional information is such that the scheme to which the application related is materially different from the scheme revealed by the additional information, they must ask you to make an application for a different private ruling. Your objection is taken not to have been made in these circumstances.

Date of effect

62. This Ruling applies from 1 January 2006. However, this Ruling does not apply to taxpayers to the extent that it conflicts with the terms of settlement of a dispute agreed to before the date of issue of this Ruling.

Commissioner of Taxation
4 October 2006

[51] Section 359-70.
[52] See paragraph 3.104 of the 2005 EM.
[53] [Omitted.]
[54] Section 359-65.

Appendix 1 – Detailed contents list

63. The following is a detailed contents list for this Ruling:

	Paragraph
What this Ruling is about	**1**
Previous Rulings	**3**
Ruling	**4**
What constitutes a private ruling?	4
What is a relevant provision?	9
What can be covered by a private ruling?	15
The status and binding effect of private rulings	19
Who may apply for a private ruling and who is covered by it?	28
The form of application and information to be provided	32
The making of a private ruling	37
Applications that do not have to be dealt with	39
The effect of inconsistent rulings	41
Rulings other than indirect tax or excise rulings	42
Indirect tax or excise rulings	48A
Revising private rulings	49
Rulings other than indirect tax or excise rulings	49
Indirect tax or excise rulings	50A
The status of private rulings following a rewrite of the law	51
The period for which a private ruling has effect	54
Delays in making private rulings	55
The review of private rulings	58
Date of effect	**62**
Appendix 1 – Detailed contents list	**63**

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TR 95/6; TR 2006/10

Previous rulings and determinations:

PGBR 2003/2W; TD 93/34W; TD 95/45W; TD 96/5W; TD 96/6W; TD 96/16W; TR 93/1W; TR 97/16W; GSTR 1999/1W; WETR 2002/1W

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