

# CAUGHT IN A BIND

DAVID MARKS tests the ATO's binding tax rulings in this Good Rulings Guide.

**W**e rely on rulings from the Australian Taxation Office every day. They inform us and help us make decisions. But how can we tell if they are any good?

Once we know what to look for in a ruling, we can make better use of it.

For instance, do we rely on the ruling simply to provide a reasonably arguable position to avert penalties? Or do we rely on the ruling all the way – to prevent a larger tax bill as well?

In this article, I will deal only with binding rulings. We always knew we were taking pre-July 1992 rulings about income tax and fringe benefits tax (FBT) on trust – sometimes, it is still appropriate to apply for a non-binding advance opinion, not a binding private ruling.

The same kinds of consideration apply to an advance opinion now as always.

There are some simple rules that help when reading a ruling. They help also when applying to the ATO for a private ruling.

Those rules are important – the Federal

Court said recently that some public rulings about leases weren't worth the paper they were written on. The Commissioner had walked away from them. The taxpayer was left high and dry.

We need to be intelligent consumers of rulings.

I will deal first with whether a ruling is binding and how far it can be relied on.

Then I will give some hints about applying for private binding rulings.

## IS IT A BINDING RULING?

That seems a fairly basic question, but sometimes it's hard to tell. Not everything is as it seems.

There are different rules for different kinds of rulings. The rules for fringe benefits and income tax rulings are in the *Taxation Administration Act 1953* (TAA). The rules for sales tax are in the *Sales Tax Assessment Act 1992* (STAA).

Although the rules differ, all are about:  
(i) when the ruling was issued;  
(ii) publication of the ruling;



Illustration by EDD ARAGON

- (iii) what the ruling should say about itself;
- (iv) the subject matter of the ruling;
- (v) the "tax law";
- (vi) the "arrangement";
- (vii) withdrawal of rulings;
- (viii) re-enactment of the law by the Tax Law Improvement Project (TLIP).

#### When Issued

A binding public or private ruling could be issued for income tax and FBT only from 1 July 1992. Previous rulings are "administratively binding", but not legally binding.

The Commissioner can depart from non-binding rulings, if necessary.

Sales tax taxpayers have relied on "binding" rulings for years. The rules in the old *Sales Tax Procedure Act* were rewritten in the STAA.

#### Publication

The TAA says a public ruling is made once it is published and a notice is gazetted.

The STAA says a public sales tax ruling

needs only to be published.

The rule about gazettal for income tax and FBT rulings was brought in for rulings published only after 30 June 1995.

Where a ruling needed only to be "published" for it to be valid, there was huge potential for confusion. For instance, rulings can sometimes be withdrawn by an inconsistent public ruling.

Moreover, there is no definition of *published* in either the TAA or STAA. The dictionary meanings talk about making something known to, or available to, the "public", or announcing something officially.

Tax professionals were bemused when the ATO's sales tax *News and Views* newsletter said in April 1994 that an article in a commercial publication, written by an Assistant Commissioner, represented the ATO's views on a contentious issue. When, precisely, had that been "published"? Had it been "published by the Commissioner"?

The Commissioner is not obliged to place a gazette notice about sales tax public

rulings. In practice, he now does so, at least for sales tax rulings that are part of the SST and STD series.

An unintended consequence of introducing the double-barrelled requirement that a ruling under the TAA is made only after publication and a gazette notice both is that, technically, the taxpayer who is serious about relying on the ruling has to find the gazette notice as well.

#### Saying What it Is

In *Bellinz v FCT*, the Federal Court said taxation determination TD 94/20 may not be a public ruling. The determination contained no statement that it was a public ruling for the purposes of Part IVA of the TAA. The law says it has to so state.

That worried me. The commercial loose-leaf rulings service to which I subscribe includes, in its version of the tax determination, that necessary statement – yet some electronic publishers are not including any statement one way or another for any ruling.



David Marks

## Rulings do not assist a taxpayer to avoid duties under the administrative provisions

Does that mean I have to visit the ATO Web site or use the *Freedom of Information Act* against the Commissioner to get a bona fide version of the ruling?

Public rulings usually say that, to the extent they are capable of being a public ruling under the TAA, they will be such a ruling. Tax professionals have been asking for years whether that complies with the TAA. In the *Bellinz Case*, the Federal Court said such a statement did not provide taxpayer certainty.

After *Bellinz*, the ATO began using a more precise statement. A newly issued ruling says that the ruling's number, subject heading, "Ruling" and date of effect are the only binding parts.

A private ruling under the TAA actually has to say that it is a private ruling for the purposes of Part IVAA of the TAA. However, a public or private sales tax ruling under the STAA does not bear any statement of that sort.

I have seen a private income tax ruling without that statement. I recommended it be sent back for amendment.

And I note that sec. 15AA of the TAA says that the validity of a private ruling is not affected if a rule in the TAA is not complied with.

Section 15AA can take you only so far, however. There are some formal difficulties that will probably not be cured.

### Subject Matter

A ruling is binding only to the extent that it can be used to change a tax liability.

Rulings about, for example, PAYE deductions, objections to assessments or garnishee rules under sec. 218 of the *Income Tax Assessment Act 1936* (the 1936 Act) do not affect tax in the relevant way.

For that reason, the Commissioner will not make a private ruling about PAYE obligations. However, there are plenty of so-called public rulings that discuss administrative and collection matters.

Previously, the Commissioner attempted to overcome that by saying, in the introduction to a ruling, that the ruling is only a public ruling to the extent it is capable of being such a ruling. That, however, had the potential to mislead the ordinary taxpayer and even the careful professional.

Two key issues about a ruling's subject

matter are the "arrangement" about which the ruling is made and how the "tax law" would operate on the arrangement.

### Tax Law

The TAA definition for these purposes is restricted. The "tax law" must be a section or a provision of, or a regulation under, an Act. It must be a rule under which the extent of liability for tax is worked out. The TAA lists the types of tax liability covered, including income tax and FBT.

Draft tax ruling TR 97/D13 on PPS variation certificates, for example, simply does not fit into that framework.

Ask yourself what would happen if the Commissioner and the taxpayer disagreed about how such a ruling applied. Section 170BA of the 1936 Act would not reduce "the amount of final tax under an assessment". There is no assessment.

Rulings can be made under the TAA about certain withholding taxes, where there is no assessment. The Commissioner is prevented from suing for, or making payable, the excess over the ruled amount of tax. The excess is remitted.

Rulings under the STAA operate only to remit sales tax.

Rulings do not assist a taxpayer to avoid performing duties under administrative provisions – except, for example, where the Commissioner is permitted to waive, or extend time for compliance with, some duty by ruling.

Apart from that, the only use of such an administrative ruling is to provide an insight into how the Commissioner is likely to administer the law.

### Arrangement

The second important element for public and private rulings under the TAA is the arrangement. The ruling must concern the impact of the tax law on the arrangement, and the impact of the tax law must give rise to some question about the calculation of tax.

A public ruling can be about a class of arrangements. Sometimes, the Commissioner will restrict a public ruling to how a class of persons is affected in case of an arrangement or class of arrangements.

The definition of *arrangement* is all-important if the taxpayer wants to rely

on the ruling. In *Bellinz*, the Court said that the addition of a step, so that an arrangement involved a third party, took the arrangement out of the scope of a ruling about bipartite deals. You cannot rely on a public ruling other than where the situation is on all fours with that ruling.

Another point is that the arrangement cannot simply be a state of fact. The ATO will not give rulings about whether something is a pre-capital gains tax asset, whether someone is in business, or whether a person is a resident.

The simple way to draft your ruling request in order to get around that is to request a ruling about a specific transaction that makes the question of fact relevant to working out tax.

Similar problems do not arise with sales tax, because it is a transactional tax. However, the taxpayer must be alert to ensure that the ruling applies, despite any changes to circumstances from time to time, because the Commissioner is not bound by a ruling under the STAA if the

taxpayer contributed to the ruling staying in force by suppressing a material fact.

#### Withdrawal of Rulings

The Commissioner withdraws a public ruling under the TAA by publishing a notice of withdrawal in the gazette.

Also, if the Commissioner makes a public ruling that is inconsistent with an earlier public ruling, the earlier public ruling is withdrawn to that extent.

Withdrawal does not affect an arrangement that has begun to be carried out.

Private rulings under the TAA are withdrawn either by service of a notice of withdrawal or by issue of a contradictory public ruling. However, the taxpayer has some protection from the effects of withdrawal – unless the taxpayer consents, a private ruling cannot be withdrawn:

- ▶ for a year that has commenced or ended; or
- ▶ if the arrangement has commenced,

unless the Commissioner considers that another person would be disadvantaged if the ruling stays in place, and the disadvantage is much greater than the disadvantage to the rulee if the ruling is withdrawn; or

▶ while the objection and appeal process is in train.

The second of those savings is similar to the “undue competitive advantage” test applied under ruling IT 2500 in relation to advance opinions.

Rules about withdrawal of sales tax rulings are more complex, partly because of the greater array of material that might be a public ruling. There is no requirement for gazettal, only a requirement that the public ruling be “published by the Commissioner”.

The tax profession has asked for gazettal to be made a requirement, but to no avail.

Great care must be taken with sales tax. Public rulings will sometimes have clauses terminating private rulings. Many private rulings, which are open-ended on

## The Duties Act - It's here

Changes to the imposition and collection of stamp duties in New South Wales are now effective following the commencement of the State's new Duties Act on 1 July 1998.

The NSW Government passed the Duties Act 1997 last November after a major collaborative effort between the Office of State Revenue (OSR) and the private sector in rewriting the legislation.

The new Act applies to all the heads of duty formerly in the Stamp Duties Act 1920, except those relating to Financial Institutions Duty (FID). These provisions will remain in the Stamp Duties Act until the future of FID is settled.

As well, the Taxation Administration Act now has application to both the new Duties Act and the Stamp Duties Act, bringing these acts into line with all other acts administered by OSR.

The simplified presentation of the legislation is designed to enable taxpayers and their advisers to be clear about their obligations.

Other changes include the revision and reproduction of all forms required for the payment of stamp duties.

Also, a new series of Revenue Rulings has commenced for the Duties Act. All Rulings written for the Stamp Duties Act have been reviewed to determine the applicability to the new Act and where appropriate will be reissued.

Although the introduction of the Duties Act would be the logical time to replace all handstamps held by authorised persons, the stamping arrangements are being considered as part of a wider review of processes within OSR. All authorised persons should therefore

continue to use the current set of stamps until further notice.

Probably the most immediate effect of the Taxation Administration Act will be the application of interest for late payment. The current fines regimes for both impressed documents and returns have been replaced by a per annum rate of interest calculated on a daily basis from the due date for payment until the date of the payment. From 1 July 1998 the interest rate is 16.8% p.a.

For more information on the new Duties Act, please call (02) 9685 2122 or 1800 629 550 toll free.

OSR also has a Client Education Team who can provide speakers for discussion groups. They can be contacted on (02) 9689 6371.

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face, in fact have a maximum life of five years, owing to public rulings.

There are numerous traps, and the amount of tax at stake is often sizeable. Recognise your limits unless you specialise in this area.

### TLIP – Meaning

Public rulings are being reviewed and amended to reflect the new section numbers.

In the meantime, sec. 1-3 of the *Income Tax Assessment Act 1997* goes some way to preserve the existing interpretation of the income tax laws.

Sections 14ZAAM and 14ZAXA of the TAA do the same job for public and private rulings respectively.

A public or private ruling about the old law is taken to be a ruling about the new law only if the old law has been re-enacted or remade, and only to the extent that the new law expresses the same ideas as the old law.

Ruling TR 97/16 says a ruling can be repealed in part if some of the new law represents a change. Changes will be made known by various means, including:

- ▶ the Explanatory Memorandum (EM) or second reading speech;
- ▶ a tribunal or court decision; or
- ▶ a public announcement by the ATO,

including a press release.

That undermines the hard-won protections the tax profession had obtained – gazettal of binding public rulings and notices of withdrawal.

At least the ATO has given a commitment now to publish “changes” in the EM for future TLIP legislation. However, I hope we don’t get into an Orwellian situation in a few years’ time where there are different views as to what the old law meant.

### TLIP – Timing

Another impact of the TLIP occurs when you are right in the middle of planning a transaction, but you know that the law is shortly going to be re-enacted.

Until re-enactment, it is futile applying for a ruling about the application of the new law – technically, there is no law until it passes Parliament and obtains assent.

Depending on timing, you can invite the Commissioner to make a “related” ruling. That is a ruling for which you have not applied, but which the Commissioner is allowed to make about the impact of another “tax law”.

By the time the Commissioner processes your ruling request, particularly when it is near the end of the income year, it may well be necessary

to make the related ruling instead, and for a subsequent income year.

### Private Ruling Requests

A private ruling request should be able to survive scrutiny in the courts. If that is not the starting position, you may be better off simply forming a view about the law yourself or taking less formal steps, such as requesting an advance opinion.

Much of the above discussion is relevant when applying for a private income tax ruling. In particular:

- ▶ identify the “arrangement” as a complete set of facts on which the law operates to produce a tax liability; and
- ▶ identify the tax law that operates on those facts.

These special rules also apply:

- (i) do not ask the Commissioner to make an assumption about the law, or about existing or past facts;
- (ii) assumptions can be made only about future facts;
- (iii) identify the years of income for which you need the ruling. If close to year-end, consider prompting the ATO to issue a related ruling for the following year, in case your deal has to happen in the next year;
- (iv) get prior written consent of rulees if one or more of the rulees is not the applicant; and
- (v) check the ATO’s “no go” list of embargoed ruling topics at its Web site – that list presently includes resettlement of trusts, split loans and the like, capital-protected equity loans, public trading trusts, Division 20 (changes in majority underlying interests) and tax deductible capital raisings. ■

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