

## [289] "Guides" in tax law – What use are they?

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All material, starting with the first section of an Act, is part of the Act. This applies right through to the last section (or last schedule, if there are schedules). See s 13 of the *Acts Interpretation Act 1901*.

But what use is a "Guide"?

Federal tax laws use "Guides", usually at the beginning of sets of rules.

In the GST Act, Guides are called "explanatory sections". Similar rules apply, however.

Each tax law emphasises the fact that a Guide is part of the Act. Section 950-100 of the ITAA 1997 is an example.

But a Guide is not "operative".

In the ITAA 1997, a Guide is "kept separate from the operative provisions": s 950-150(2). (In the GST Act, "explanatory sections" appear at designated places, identified by s 182-10(2).)

A Guide's use "in interpreting an operative provision" is spelt out precisely. See for example s 950-150(2) of the ITAA 1997.

Thus Pagone J in *Financial Synergy Holdings Pty Ltd v FCT* [2015] FCA 53 (reported at 2015 WTB 6 [145]), at [15], said that a Guide "may itself have no operative effect". His Honour referred to the limited way a Guide may be used.

The limitations on the use of a Guide are spelt out in each tax law's interpretation chapter.

A Guide may only be considered in interpreting an operative provision:

(a) *in determining the purpose or object underlying the provision; or*

(b) *to confirm that the provision's meaning is the ordinary meaning conveyed by its text, taking into account its context in the Act and the purpose or object underlying the provision; or*

(c) *in determining the provision's meaning if the provision is ambiguous or obscure; or*

(d) *in determining the provision's meaning if the ordinary meaning conveyed by its text, taking into account its context in the Act and the purpose or object underlying the provision, leads to a result that is manifestly absurd or is unreasonable.*

(Quoting s 950-150(2) of the ITAA 1997)

A Guide will inevitably be wrong. That is simply stating a fact.

At its best, a Guide will encapsulate the most significant aspect of the operative provisions, in simple language.

So it is questionable whether the law should confer any status on a Guide.

In *Financial Synergy Holdings Pty Ltd v FCT* (above), Pagone J found that the Guide in Subdiv 109-B of the ITAA 1997 was consistent with the operative provision. The only question that flows from that is whether it is useful to have a Guide which was even arguably at variance with the operative provision.

Further questions arise where other extrinsic material, like a Report of an Inquiry, appears to contradict a Guide. Allsop J was content to take into account part of the Ralph Report, despite it apparently being contradicted by the Guide to part of the PSI rules. See *IRG Technical Services Pty Ltd v DCT* (2007) 165 FCR 57; (2007) 69 ATR 433; [2007] FCA 1867, at [28].

This may seem odd. You may look to the Guide to determine the "purpose or object" of an operative section. And the Guide was presumably drafted by the person who wrote the operative material.

But once extrinsic material, like Reports, EMs and Hansard, were let in by s 15AB of

the Acts Interpretation Act, there was always the chance that these *ephemera* might collide with each other. Now, such extrinsic materials can collide with a non-operative Guide within the statute.

The worst situation, however, is where a Guide is simply wrong. Section 20-1 of the *Tax Agent Services Act 2009* is an example. It is a Guide, and thus not operative according to s 80-5. Among other things, it says of Div 20 of that Act that: "You must be registered to provide tax agent services for a fee ...".

But there is no operative provision which actually says that in Div 20. That Division only speaks of eligibility to register, applications to register, the decision to register (including duration of registration, and conditions imposed), and renewal.

So the Guide is not, even arguably, an accurate guide to Div 20. (The restrictions on provision of services are in the civil penalty rules in Div 50.)

### Summary

Guides are not operative. They have limited use, in assisting in the interpretation of the operative rules. They are inherently unlikely to be accurate, leading to debate as to whether operative rules are restricted by a Guide. They can come into conflict with extrinsic material, such as reports and EMs.

There is a good case for removing even the limited role of a Guide. But that is up to Parliament.

In the meantime, a Guide should be used with caution.