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UNIVERSITY OF WOLLONGONG

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PRIVATE BINDING RULINGS WITH SELF ASSESSMENT

by

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PRIVATE BINDING RULINGS WITH SELF ASSESSMENT.

The Taxation Laws Amendment [Self Assessment] Act 1992, [Act No. 101 of 1992], provided for a system of binding and, in some cases, reviewable tax rulings. Rulings may be either Public or Private. To-day I will be talking to you about Private [Binding] Rulings but it would assist if I just spoke briefly about Public Rulings which incidentally are not reviewable. Only Private Rulings will be reviewable by the Administrative Appeals Tribunal [AAT] or the courts.

A Public Ruling is released by the Commissioner for the information of the public generally and these public rulings are available at a fee from the Freedom of Information Units attached to any ATO Branch Office. Such public rulings are also issued as part of rulings subscription services offered by commercial tax publishers and will be found in your libraries. Often these rulings are issued in draft form to enable public comment to be made before final release. Such public rulings whether in draft or finally settled are designated as Tax Determinations when they deal with a specific issue in a simple Question and Answer format whereas the term Rulings is reserved for a detailed exposure of a particular tax problem.

A Private Ruling, for the moment, may be simply described as a ruling given to individual taxpayers about their own particular tax affairs. The objective of the amendments to the Taxation Administration Act [TAA], Income Tax Assessment Act [ITAA] and the Fringe Benefits Tax Act [FBT] which affected rulings was to ensure that rulings made by the Commissioner about the application of tax laws [which cover income tax, FBT, Medicare Levy, withholding taxes and franking deficit tax] are to be binding. Secondly, to provide that Private Rulings were to be reviewable in the same way as assessments are reviewable under Part IVC of the Taxation Administration Act.

WHAT IS A PRIVATE RULING ?.

Private Rulings are a written response made by the Commissioner to requests from taxpayers for a ruling about the application of the tax law[s] to a nominated person [the "rulee"] in respect of a specified year of income in reference to a specific or to a particular arrangement[Ss. 14 ZAA[1], ZAF, ZAG and ZAR of the TAA].

For the benefit of rulees the ATO has prepared an application form to be completed for those seeking a private ruling [copies are available here to-day for your information and later use if you have a suitable request in mind !] Such an application for a private ruling may be made on or after 1 July 1992 and not before this date. Also any private ruling which is made in response to an application or request can only apply to arrangements that began on or after 1 July 1992.

So as you will see a private ruling is a matter of a written communication between the taxpayer client and the Commissioner with a reply in writing concerning the taxation affairs of the taxpayers nominated in the ruling. People can apply for a private ruling about a matter that not only affects them or, with the written consent of another person, about a tax matter that affects that other person [ss. 14 ZAF & ZAG TAA]. Thus, if a number of persons wish to seek a ruling on a particular arrangement then with the written consent of the others, a person may make an application on behalf of the others.

PRIVATE RULINGS : APPLICATION FORMAT.

Whilst a taxpayer will usually complete the standard ruling application form to seek a private ruling it will still be possible to make such a request in a different written format [such as a letter] provided that all the information required by the Commissioner to make the ruling is contained in the said document. It is understandable that a request for a ruling on a straight forward routine tax matter would not require the same amount of detail and/or information as you would be expecting in a complex financial transaction. Should the information be considered to be insufficient to allow the Commissioner to be able to make or to give a ruling then the applicant must be asked to provide the additional information needed[s14 ZAM TAA.] Thus, the Commissioner is unable to refuse a request for a private ruling simply because the rulee has failed to supply sufficient information in the application.

BINDING PRIVATE RULINGS.

With a private ruling you have a situation where the Commissioner has expressed an interpretation of tax

law[s] to a particular or specific arrangement into which a nominated taxpayer has entered or has proposed to enter in a particular year of income. A private ruling will be considered to be binding on the Commissioner [and the subject taxpayers]] if it could be said to be favourable to a person. A ruling about a tax matter will be regarded as favourable if the way in which the particular tax law concerned would be applied will be different to the position as stated in the provided ruling and the tax payable under an assessment would, because of the difference, be more than it would have been if the ruling had been correct. The taxpayer will be able self-assess in line with the ruling supplied. The Commissioner will be bound by the ruling and will allow the taxpayer[s] concerned to pay the lesser amount of tax. If the Commissioner was to make an assessment concerning this matter then he is compelled to act in line with the ruling. It is not possible for the Commissioner to seek to amend the assessment in this regard[ss170 BA-BE of the ITAA and ss.74 A-C of the FBT Act].

CONSEQUENCES SHOULD A PRIVATE RULING NOT BE FOLLOWED.

As already explained the Commissioner will be bound to apply and to follow a favourable ruling. A taxpayer who is the recipient of an unfavourable private ruling prior to self assessing will be required to follow the ruling upon self-assessment. To do otherwise will see the taxpayer facing additional tax [a 25% shortfall penalty] if there is a tax or franking tax shortfall[ss.160 ARZE & 226 M ITAA]. There will be no such penalty should a decision of the AAT or the court apply to the ruling after an objection to the ruling[ss. 160 ARZE[2] & 226 M [2]]. Some taxpayers or agents on behalf of taxpayers seek a private ruling after the lodgment of the tax return for the particular year concerned. If the Commissioner then makes an unfavourable ruling on this request then if there is an assessment in question you could expect an amendment and an amended assessment to issue. Consider whether there is a voluntary disclosure here and the affect if any on any penalty [ss.160 ARZK & 226 Z ITAA].

FORMER S 169A ITAA RULING REQUESTS.

Readers may recall in previous years submitting s169A requests for rulings with their income tax returns. This provided that where a question is raised that is relevant to the liability of the taxpayer to tax in respect of the year of income, the Commissioner shall give attention to that question[the former ss.169a[2]]. Sub-section 169A[2], as it now reads, limits such requests to arrangements which had begun to be carried out at 1 July 1992 when Part IVAA [Private Rulings] TAA came into effect.

COMMISSIONER MAY GIVE ADDITIONAL PRIVATE RULINGS.

Where a taxpayer makes a private ruling request which is quite specific in its application to an arrangement and to a particular tax law, the Commissioner may provide such a ruling as is considered appropriate. For example, a person may seek a ruling addressed to ss.25[1] in relation to the disposal of an asset. If the Commissioner formed an opinion that ss.25[1] had no application then a brief private ruling could be issued just stating this view. This would be correct even if the Commissioner formed an opinion that the Part 111 A [Capital Gains Tax] provisions applied. In such a case the Commissioner is able to provide the rulee with both answers in a private ruling or give another private ruling about how Pt.111A applied.[paragraphs 14 ZAP[a] and [b] TAA.].

Should a rulee seek a private ruling which is in respect of a stated year of income and in reference to an arrangement which was to be carried over a number of years then the Commissioner may give an additional ruling[s] concerning the other year[s][paragraph 14 ZAP[b][ii]].

In dealing with additional matters [such as a year not covered by the application] it is not possible to provide just one private ruling which seeks to cover the matters raised in the original application and the additional matter[s]. The reason is because it all relates to either a different year[s] or to different arrangements. So as to permit private rulings to be reviewable then it becomes necessary that each cover only a single year of income and only one arrangement.

ASSUMPTIONS OF THE COMMISSIONER IN MAKING PRIVATE RULINGS.

If the correctness of a Private Ruling would rely on assumptions made by the Commissioner about a future event or other matter, then the Commissioner may either decline to make the ruling sought or to make the appropriate assumptions[s]14ZAQ TAA]. The Commissioner is unable to make assumptions about information which the rulee could provide.

TIME LIMITS.

While the Commissioner may generally comply with a request for a private ruling, even though not required to, it will not be possible to respond to any application or request that is made more than four[4] years after the due date for lodgment of the particular year of income which is to be covered by the request. It will be observed that this time limit is consistent with similar

rules covering requests for an amendment to an assessment.

SITUATION SHOULD THE ATO DELAY PROCESSING A PRIVATE RULING REQUEST.

If a taxpayer makes a request for a private ruling and if the Commissioner has still not dealt with it within three[3] months of its application, then the applicant/rulee may ask for a written statement of the reasons for the delay[ss 14 ZAO[1] TAA.]. This enquiry request must be in writing. The Commissioner is required to give a statement of the reasons why the consideration of the application has been delayed and to provide this as soon as practicable. Where there is a case in which the Commissioner has sought further information from the applicant/rulee then the three[3] months period will commence when the information is supplied to the ATO. Until the Commissioner makes this ruling or tells the applicant that there will be no compliance with their request then there is a statutory requirement, at three[3] monthly intervals, to provide further statements as to the reasons for the continued delay[ss 14 ZAO[3] TAA.]. This probably serves as an incentive to answer the taxpayer's request.

APPLICATIONS THAT THE COMMISSIONER DOES NOT HAVE TO HANDLE.

The Commissioner must comply with an application or request for a private ruling except in a limited number of instances or cases[ss 14 ZAL[1] and refer onto s. 14ZAN of the TAA.]. As a general rule, the Commissioner will not have to provide a Private Ruling about a matter if it has already been decided, or if it will be determined through a different process. To supply a ruling in such cases would result in a duplication of work. Also the Commissioner will not have to respond to a ruling request where it is considered that the matter will be decided in the course of a tax audit that commenced before the application[paragraph 14 ZAN[d] TAA.]. In addition, the Commissioner will not to deal with applications which are frivolous or purely hypothetical or it is considered that it would be unreasonable to comply in view of resources that would be needed to attend to the request. What are the situations envisaged here ? [See the examples provided in the Explanatory Memorandum[E.M.]].

WITHDRAWAL OF PRIVATE RULINGS.

The Commissioner may withdraw a Private Ruling, either wholly or in part, with the consent of the rulee[ss.14 ZAU[1] TAA.]. It is also possible for the Commissioner to withdraw a private ruling without the consent of the

rulee in certain circumstances except where the ruling is still under review or has been reviewed by the AAT or a court.

A Private Ruling may otherwise be withdrawn by the Commissioner without the consent of the rulee if the arrangement dealt with in the ruling has not begun to be carried out[paragraph 14 ZAU[2][a] TAA.]. Another instance of a such permitted withdrawal is when the arrangement has commenced and the Commissioner considers that a person other than the rulee would suffer a disadvantage if the ruling was not withdrawn. The disadvantage must be greater than any that the Commissioner considers the rulee will suffer if the ruling is withdrawn[paragraph 14 ZAU[2] TAA.] A private ruling cannot be withdrawn if the year to which it relates has already commenced or ended[ss. 14 ZAU[4]].

The method of withdrawal of a private ruling, whether wholly or in part, is by service of a written notice of the withdrawal on the applicant[s 14 ZAV]. A Public Ruling that is inconsistent with a private ruling means that the Commissioner is taken to have withdrawn the latter so far as there is inconsistency and the withdrawal is allowed by s. 14 ZAU [See s. 14 ZAW TAA.].

FORM AND CONTENT OF A PRIVATE RULING.

A notice of a Private Ruling must be served on the rulee in writing and it must state that it is a Private Ruling. It must identify the person, the year of income, the applicable arrangement and any assumptions which are made in the ruling. All this becomes important for the purposes of determining the extent to which a ruling is binding.[See ss. 14 ZAR and ZAS TAA.].

CERTAIN PRIVATE RULINGS WHICH HAVE NO EFFECT.

A Private Ruling will not have any effect if it was given to the rulee about someone else's tax position and it is subsequently discovered that the consent of the other person was not genuine or had been withdrawn before the application was made[paragraph 14 ZAY [1] [a] TAA.]. Generally, a private ruling will be of no effect if it was later discovered that there was no need to have complied with the initial request. Such a case would be where the Commissioner had already given a ruling about the matter[see paragraph 14 ZAY [1] [b] TAA].

PRIVATE RULING REVIEWS.

A rulee may object against an unfavourable Private Ruling in the same way as an objection can now be lodged against an assessment[s. 14 AZA TAA.]. There are two[2] cases where it is not possible to object against a private ruling. This will occur when an assessment has been made in respect of an arrangement and the year of income covered by the ruling. In such a case the matter[s] dealt with in the private ruling may be reviewable if the person lodges an objection against the assessment[paragraph 14 ZAZA[2][a] TAA]. Again, an objection will be unavailable where the private ruling relates to withholding tax that has become due and payable. This is a reflection of the existing law which does not allow for objection to be made in such a situation[paragraph 14 ZAZA[2][b] TAA.]

Where an objection against a Private Ruling is either allowed in full or partially and if there no application for further review then the said ruling is taken to have been altered in accordance with the decision on the objection[s. 14 ZAZB TAA.]. A rulee may seek a review of a disallowed objection decision before the AAT or a court. It is worth remembering that as a consequence of reviewable private rulings it will not be possible to object against the assessment in reference to the same matter[s. 14ZVA TAA.]. The simple reason for such a limitation is to ensure that there will not be two reviews of the same matter.

OBJECTION TIME LIMITS AGAINST PRIVATE RULINGS.

A rulee who wishes to object against a Private Ruling must do so before the end of the later of sixty [60] days from the date the ruling in question was given or four [4] years after the last day allowed for lodging a tax return for the year of income covered by the ruling [see paragraph[s] 14 ZW[1A][a]-subclause 8 [g] and 14 ZW[1A][b]-subclause 8 [g] of the TAA.]. Remember, only private rulings are reviewable.

CONCLUSION

The Private Binding Ruling system was introduced to enable taxpayers to obtain certainty in a self-assessment environment. Taxpayers, therefore can seek this certainty they need in their business and financial affairs by obtaining rulings on contentious matters. Enough has been said on how the private binding ruling system operates. My talk this morning will also include reflections on how the whole process has actually worked. An appraisal or a scorecard of the last twelve months.

THANK YOU FOR YOUR INVITATION TO SHARE WITH YOU TO-DAY.
NOW IT IS OVER TO YOU FOR YOUR QUESTIONS.