Private rulings: are they worth it?

by Paul McNab, CTA, Partner, DLA Piper

This article seeks to describe a structured approach, with reference to the law and relevant decisions, which may be used when trying to decide whether it is worthwhile to apply for a private ruling. The framework suggested is that which is generally used in choosing consumer products. The article suggests that the decision must be made by reference to the taxpayer's corporate attitude to tax risk, and the other approaches available for achieving the desired level of certainty on the tax risk associated with a particular issue. Depending on the circumstances, other approaches may be preferred. Rulings, however, offer an opportunity to understand the Commissioner's reaction to a situation and, through engagement, achieve a positive response. They require particular care in drafting, and care in the evaluation of the response.

Introduction

Two recent Federal Court decisions present a useful opportunity to think again about the role that private rulings might play in managing a taxpayer's tax risk.

In *Aurizon Holdings Ltd v FCT*,[1] the court commented on why a ruling would not have been suitable there. And in *Landcom v FCT*,[2] the court considered the role of rulings in relation to state/territory government entities paying "GST equivalents".

Aurizon, in particular, invites us to think again about how and when we use rulings. This article will try to give taxpayers the information they will need to determine the value to them of seeking a "private ruling".

The article will discuss what actually constitutes a private ruling. It will examine the attributes of such a ruling, and then compare and contrast it with other strategies which might give similar outcomes. In doing so, it will consider the relevant statutory rules and court decisions. Finally, the article will try to offer some thoughts on how to answer the question posed by the title.

In the annual report for 2020–21, the Commissioner advised that he had issued 3,977 rulings during the year (compared to 5,285 in 2019, and 4,126 in 2020). Of these, 81% were finalised within 28 calendar days of receiving all of the necessary information, and 90% of taxpayers were contacted with 14 calendar days where the matter was expected to take more than 28 days to finalise. Approximately 60% of taxpayers thought the process and outcome were fair. So there are clearly a significant number of taxpayers who choose to seek a ruling, and most seem to think it worthwhile.[3]

The author has not set out the origin or history that led to the current rules (which came into effect in 2005).

The question of whether private rulings are worth it is a subjective one for each taxpayer, and the answer will depend on the benefits that emerge from the analysis described in this article. But these must be weighed against the cost (both in preparation and risk) in asking for a ruling. Or not asking for a ruling.

While many taxpayers will hope for a simple "yes or no" answer to the question, it is only possible for this article to give some of the information which will be needed by a taxpayer as they answer the question for themselves.

The classic factors in "is it worth it?" decisions arise around consumer products and typically involve consideration of the following:

- utility (whether the outcome from the process was more useful than from competing processes);
- enjoyment (whether the experience was no more painful perhaps than other options, in the context of a tax question); and
- cost (whether the utility and enjoyment was such that you thought the cost worthwhile).

These are deeply individual and subjective factors in most cases.

The legislation and case law are primary tools in decision-making, but taxpayers should also consider the database of redacted private rulings published by the Commissioner.[4] Although not binding on the Commissioner for other taxpayers, they can often guide the approach taken.

The author's final introductory observation is that the level of certainty on a tax issue that is required is usually set by the taxpayer's "tax risk policy". This will vary depending on factors such as the amount of the tax at stake, the level of opinion given by advisers, and public statements by the ATO on the issue. It also depends on whether the taxpayer has been advised by the Commissioner that a failure to seek confirmation of positions will lead to a deterioration in the taxpayer's relationship with the Commissioner. Not all taxpayers or all issues require certainty. The topic of this article only arises when a taxpayer makes a decision that greater comfort is required on a tax risk.

The legislation

Private rulings are dealt with under Div 359 of Sch 1 to the *Taxation Administration Act 1953* (Cth) (TAA53)[5] (there are

also "common rules" relating to all types of rulings found in Div 357 that must be considered).

Under s 359-5, the Commissioner may "make a written ruling" on the way the Commissioner considers "a relevant provision" "applies or would apply" to a taxpayer in relation to a "specified scheme". This is called a "private ruling".

So a private ruling is a written document from the Commissioner to a taxpayer. Section 359-15 provides that the ruling must be in writing and given to the applicant (electronic transmission is permitted). Under s 359-20, the ruling must identify the particular entity that it applies to, and specify the scheme and provisions covered. It must "state that it is a private ruling".

The ruling may state its commencement and cessation times, but if none is specified, it applies from when it is made. If no cessation time is specified, the ruling ceases to apply at the end of the income year or accounting period when it started to apply. The ruling may start or end with reference to a specified event, and it may have a commencement time in the past (s 359-25).

The key benefit of such a ruling is found in s 357-60 which states that "a ruling" "binds the Commissioner" in relation to "you". If it applies to you, and you rely on it by acting (or omitting to act) in accordance with it, the Commissioner is then unable to increase your tax liability in relation to the subject-matter of the ruling, or apply penalties and interest if there is a later disagreement. This certainty can be valuable.

Some of the key concepts are outlined in the following discussion.

What is a "relevant provision"?

One of the key concepts is that of a "relevant provision". These are the provisions of Acts and Regulations on which the Commissioner may rule, and that the Commissioner has the "general administration" of. They are set out in s 357-55:

> "… any of the following:
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> (a) tax;
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> (b) Medicare levy;
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> (c) fringe benefits tax;
>
> (d) franking tax;
>
> (e) withholding tax;
>
> (f) mining withholding tax;
>
> (fa) petroleum resource rent tax;
>
> (fb) indirect tax;
>
> (fc) excise duty;
>
> (fd) levy under the *Major Bank Levy Act 2017*;
>
> (fe) Laminaria and Corallina decommissioning levy;
>
> (g) the administration or collection of those taxes, levies and duties;
>
> (h) a grant or benefit mentioned in section 8 of the *Product Grants and Benefits Administration Act 2000*, or the administration or payment of such a grant or benefit;
>
> (i) a net fuel amount, or the administration of a net fuel amount;
>
> (ia) an assessed net fuel amount, or the collection or payment of an assessed net fuel amount;
>
> (j) a net amount, or the administration of a net amount;
>
> (ja) an assessed net amount, or the collection or payment of an assessed net amount;
>
> (k) a wine tax credit, or the administration or payment of a wine tax credit."

It is an extensive list. Although private rulings can be sought about many taxes, levies and duties, this article is focused on income and withholding tax. Relevantly, the list includes "tax", "withholding tax', and the administration or collection of those taxes.

What must the taxpayer give the Commissioner?

The primary requirement that the taxpayer must give to the Commissioner is a written request (s 359-10). The request must specify that it is for a private ruling and it must be in the approved form.[6]

In addition, s 359-20 requires that the ruling request identify the entity to whom it applies, the relevant scheme, and the relevant provision of the law that it relates to. The term "scheme" has the same meaning as it does in the *Income Tax Assessment Act 1997* (Cth), where s 995-1 defines it as:

> "***'scheme'*** means:
>
> (a) any arrangement; or
>
> (b) any scheme, plan, proposal, action, course of action or course of conduct, whether unilateral or otherwise."

And "arrangement" means:

> "***'arrangement'*** means any arrangement, agreement, understanding, promise or undertaking, whether express or implied, and whether or not enforceable (or intended to be enforceable) by legal proceedings."

Clearly, these expressions permit a wide range of matters, relating to the relevant provisions, which may be put to the Commissioner.

In addition to the material that must first be given to the Commissioner, there is a variety of other information that the Commissioner may take into account.

Under s 357-105, the Commissioner "must" request further information if he considers it is required. This effectively ensures that the Commissioner cannot simply refuse to rule if he considers more information is required.

Additional information from the applicant "may" be taken into account, whether supplied in response to such a request or not. The Commissioner may also take into account any relevant information provided by an entity other than the applicant, provided he tells the applicant and gives the applicant a reasonable opportunity to respond before making the ruling (s 357-120).

If the applicant does not give any information that has been requested, the Commissioner may decline to rule (s 357-105).

It is also possible for the Commissioner to make and state assumptions if he believes that the correctness of a ruling will depend on assumptions about a future event or other matter (s 357-110). In doing so, the Commissioner must tell the applicant about the assumption and give the applicant a reasonable opportunity to respond.

A taxpayer may withdraw a request (s 359-10(3)).

What does the Commissioner have to do?

The Commissioner *may* make a ruling (s 359-5), rather than *must*, because s 359-35 states that the Commissioner "must" comply with an application and make the ruling, but that is subject to some important carve-outs. The first are:

> "(2) The Commissioner may decline to make a private ruling if:
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> (a) the Commissioner considers that making the ruling would prejudice or unduly restrict the administration of a taxation law; or
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> (b) the matter sought to be ruled on is already being, or has been, considered by the Commissioner for you.
>
> (3) The Commissioner may also decline to make a private ruling if the matter sought to be ruled on is how the Commissioner would exercise a power under a relevant provision and the Commissioner has decided or decides whether or not to exercise the power."

As noted above, if an applicant fails to give requested information, the Commissioner may decline to rule. And he may decline to rule if it is considered that the correctness of the ruling would "depend on which assumptions were made about a future event or other matter" (s 357-110).

There is no private ruling unless it is recorded in writing and given to the applicant (s 359-15). And, as noted above, the ruling must state that it is a private ruling, and identify the entity to whom it applies, the relevant scheme and the relevant provision to which it relates (s 359-20).

The validity of a ruling is not, however, affected merely because a provision relating to form or procedure for making it has not been complied with (s 357-90).

Consequences of a ruling issuing

Favourable ruling

If a favourable ruling issues, the taxpayer can generally rely on it. Section 357-60 is the critical provision which states:

> "(1) … a ruling binds the Commissioner in relation to you (whether or not you are aware of the ruling) if:
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> (a) the ruling applies to you; and
>
> (b) you rely on the ruling by acting (or omitting to act) in accordance with the ruling.
>
> …
>
> (2) You may rely on the ruling at any time unless prevented from doing so by a time limited by a taxation law. It is not necessary to do so at the first opportunity."

The Commissioner may still be bound, even if the relevant legislation is re-enacted, provided the new provision still deals with the "same ideas".[7] Section 357-85 provides:

> "If:
>
> (a) the Commissioner makes a ruling about a relevant provision (the ***old provision***); and
>
> (b) that provision is re-enacted or remade (with or without modifications, and whether or not the old provision is repealed);
>
> the ruling is taken also to be a ruling about that provision as re-enacted or remade (the ***new provision***), but only so far as the new provision expresses the same ideas as the old provision."

Unfavourable ruling

Under s 359-60(1) and (2), an unfavourable ruling is a "taxation decision" within the meaning of Pt IVC, giving rise to a right to object against it. Disallowance of the objection is an "objection decision", triggering rights of appeal to the Administrative Appeals Tribunal or the Federal Court in the usual circumstances.

An applicant cannot object if there is otherwise an assessment for the income year (or other period) which the ruling relates to (s 359-60(3)). This is because it is intended that, if an assessment has been raised, the Pt IVC proceedings should be in relation to the assessment, rather than the ruling.

An applicant also cannot object to an aspect of an assessment which has been the subject of an objection to a ruling (s 14ZVA TAA53).

Ruling withdrawn or superseded

Private rulings may be altered before the scheme commences and before the period covered by the scheme. This can occur by the ruling being revised (s 359-55), or by a later inconsistent public ruling (item 3 of s 357-75(1)).

Consequences of a refusal or failure to rule

If, within 60 days, the Commissioner has not made a ruling or told the applicant that he will decline to make it, the applicant may give the Commissioner a written notice requiring the ruling to be made. The 60-day period can be extended if the Commissioner requests further information, advises assumptions that the Commissioner proposes to make, advises of third party information that

the Commissioner proposes to take into account, or refers a valuation to a valuer (s 359-50).

However, if the Commissioner has not responded within 30 days of the relevant period, the applicant may object against the failure to make the ruling and lodge a draft private ruling with the objection (s 359-50(3) and (4)).

The Commissioner must make a ruling in the same terms as the draft, or make a different ruling. If this is not done within 60 days, the Commissioner is taken to have disallowed the objection (s 14ZYA TAA53).

A refusal to rule, in itself, is not a "taxation decision" which gives rights of objection, but such a decision may be reviewable under the *Administrative Decisions (Judicial Review) Act 1997* (Cth).[8]

Relevant decisions

There have been a number of court decisions that touch on issues that have particular relevance to private rulings. The decisions relate to a number of common themes, such as:

- the standing of a taxpayer to object to a ruling;
- the precise subject-matter of any appeal;
- the question of what a valid ruling is;
- the ability of the AAT or court to consider new evidence and make assumptions; and
- the role of private rulings generally.

The decision in *Landcom v FCT*[9] is interesting, but it may have limited application beyond the world of state/territory government bodies paying "GST equivalent" tax under the state/territory and federal arrangements that tax otherwise constitutionally exempt state/territory bodies. It was held by the court that these arrangements could be the subject of a valid ruling and therefore give rise to the rights of appeal that ordinarily arise under the ruling provisions discussed above. In doing so, the court suggested that the Commissioner has wide power to issue a ruling on the operation of tax law, even where the relevant provisions may only have a glancing application to a taxpayer.

Landcom is also memorable for Thawley J's suggestion that the Commissioner's arguments were "funambulistic"[10] — probably its first use in a Federal Court judgment, and a first as an epithet for the Commissioner.

In *CTC Resources NL v FCT*,[11] it was held that a taxpayer who did not implement a scheme covered by a ruling was not "dissatisfied" because the ruling could not affect the tax liability of the taxpayer. However, in *Corporate Business Centres International Pty Ltd v FCT*,[12] it was held that, in order to be "dissatisfied", the ruling must have had some effect on the tax affairs of the taxpayer. Having a commercial interest (as scheme promoter, for instance) was not enough.

Bellinz Pty Ltd v FCT,[13] in 1998, dealt with a taxpayer who sought a private ruling concerning whether a taxpayer who was a partner in a partnership was entitled to deductions for depreciation of certain plant. The Commissioner ruled against the taxpayer who appealed, eventually to the Full Federal Court.

In *Bellinz*, the events around the ruling request appear tortuous. Despite initially getting a favourable "draft" ruling, the process was seen as not going to deliver a final ruling by the date needed for commercial reasons. The taxpayer sought a writ of mandamus against the Commissioner. Those proceedings were resolved by the Commissioner agreeing to issue a ruling by a fixed date. Which was unfavourable. The taxpayer then objected.

While it was possible to state the ruling issue fairly succinctly, the taxpayer also raised administrative law issues relating to proceedings for judicial review and mandamus which the parties had agreed would be discontinued.

Although there was little dispute between the parties as to the relevant facts, the court said that, in an appeal on a ruling:[14]

> "The Court can have regard only to the arrangement as described in the ruling itself, supplemented by any documentation referred to in it."

In *National Speakers Association of Australia Inc v FCT*,[15] it was found that there was no valid "request for ruling", or "ruling", when both documents did not identify the year or the arrangement. The taxpayer sought a ruling on whether it was exempt from tax. The court implied[16] that the arrangement might have been described in terms of "its arrangements for membership and the like". So there might have been a description of the organisation and operation of the association in a particular year (or years) and a question as to whether amounts received in those years were exempt from tax under the relevant provision. It appears that the taxpayer provided much of this information, but did not actually draft a ruling request setting out the information in this manner. This is consistent with the observation by the court in *FCT v Executors of the Estate of Subrahmanyam* that:[17]

> "… the course of conduct of a taxpayer (ie what the taxpayer does) can be seen as an arrangement and in a case where that course of conduct is complete it can be said to have been carried out."

In *Subrahmanyam*, the court was faced with potentially inconsistent evidence which could only be resolved by making assumptions about the taxpayer's state of mind. The court observed that, since the taxpayer had died and further evidence could no longer be obtained, the Commissioner could either make assumptions or decline to rule.

Section 357-90 provides:

> "The validity of a ruling is not affected merely because a provision of this Part relating to the form of the ruling or the procedure for making it has not been complied with."

Despite this, in *Corporate Business Centres International*,[18] the court held that s 357-90 could not rectify defects (such as lack of identification of the scheme) which meant that a purported ruling was actually not valid.

In *FCT v McMahon*,[19] it was held that the arrangement as described in the ruling is the arrangement that will be considered by the courts on any appeal. The question will be whether the application of the law described by the Commissioner is correct — not whether he got the facts right:[20]

> "The procedure *(of applying for a ruling)*, thus, is not designed to determine disputed questions of fact or even to make any binding determination of fact at all."

Although the court in *McMahon* placed much emphasis on ensuring that the taxpayer correctly and fully described the arrangement, the decision makes clear that it is the ruling's description that is critical.

Rosgoe Pty Ltd v FCT[21] carried this point further in finding that, on appeal, the AAT was not permitted to redefine the arrangement as defined in the ruling. It could not "find" facts not stated in the ruling. In this sense, an AAT review of a ruling is not a "normal" AAT review.

Despite a clear and accurate factual description, changes in facts can cripple a ruling's usefulness. In *Mount Pritchard & District Community Club Ltd v FCT*,[22] the Commissioner asserted that a ruling was no longer binding (part way through the seven years that it had originally covered) because an "amalgamation" with another club represented a material change to the arrangement ruled on.

> "*Landcom* is also memorable for Thawley J's suggestion that the Commissioner's arguments were 'funambulistic' …"

The court held that an assessment issued in such a case was appropriately addressed on objection in the normal course under Pt IVC where the taxpayer bore the burden of adducing evidence to show that the facts in the year were not "materially different"[23] to the arrangement covered by the ruling. In *Carey v Field*,[24] the court thought a difference would be material if it would have affected the tax outcome ruled on, had it been considered by the Commissioner. That decision concerned an application for review of a decision in relation to a public product ruling, but would seem entirely relevant.

As no evidence on whether there was a material difference had been led in *Mount Pritchard* when making the application for declaratory relief, it was a clear problem for the court. Other appeal proceedings under Pt IVC had been instituted, and it is clear the court was pointing out what would need to be addressed in those proceedings for the taxpayer to be successful. This was an important limitation. The taxpayer is unable to assert that a ruling prevents the Commissioner from raising a valid assessment.

In the author's opinion, the most recent comment on the properties of rulings is to be found in the *Aurizon* decision.[25] That decision concerned the question of whether a certain amount, to the credit of a capital distribution account, was an amount of share capital. The credit arose as recognition of an asset, a receivable, transferred to the company by the state of Queensland (not in consideration for the issue of shares, but simply as a contribution to the capital of the company at the time of its listing). The court held that it was an amount of share capital.

The taxpayer had sought declaratory relief under s 39B(IA)(c) of the *Judiciary Act 1903* (Cth), and s 21 of the *Federal Court of Australia Act 1976* (Cth).

Among his other arguments, the Commissioner contended that declaratory relief, which is a discretionary remedy, was not appropriate because the private ruling process, and the rights that a taxpayer has under Pt IVC in relation to a ruling, was an alternative and more appropriate approach for the taxpayer. The Commissioner argued that the taxpayer "had not identified any reason why relief under Part IVC in relation to a private ruling was not available".[26]

While the court acknowledged that, in relation to assessment decisions, it was accepted that the Pt IVC process meant that discretionary relief "may be (and often will be) withheld",[27] it did not feel that this logic should be extended to the private ruling process.

Thawley J set out a number of reasons why this was an appropriate conclusion:[28]

> "… it would have been, to say the least, difficult to identify with any certainty the relevant facts upon which the ruling would be made. As the course of these proceedings has shown, it was only shortly before the hearing that the parties were able to agree a number of relevant facts. Certain facts were only perceived to be relevant and made the subject of evidence, during the course of the hearing. Secondly any appeal would have been confined to the facts as put in the ruling application. It there had been a Part IVC appeal from a ruling, it is likely that the facts in the private binding ruling application would have been shown to be wrong in some respect with the result that the whole process would likely miscarry and need to start again. Thirdly, third parties (Aurizon's shareholders) have an interest in the issue being resolved in a way which binds the Commissioner and this is not achieved through a private binding ruling."

Other options

Public rulings

Public rulings are defined in s 358-5(1):

> "(1) The Commissioner may make a written ruling on the way in which the Commissioner considers a relevant provision applies or would apply to:
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> (a) entities generally or a class of entities; or
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> (b) entities generally, or a class of entities, in relation to a class of schemes; or
>
> (c) entities generally, or a class of entities, in relation to a particular scheme."

The basic requirements for a valid public ruling are similar to a private ruling, except that there is no right of objection against a public ruling.

Public rulings are intended to deal with the situation of a larger number of affected taxpayers. The public ruling process does not have the same application process that may be reviewed by the courts, but they are binding on the Commissioner.

Oral rulings

Individual taxpayers may apply to the Commissioner for advice in relation to the application of a "relevant provision" to a "scheme" under s 360, and receive oral advice.

The Commissioner is not obliged to give an oral ruling if it relates to a business or complex matter or has previously been considered for the individual (s 360-5(2A)).

The limitation to individual taxpayers severely limits their usefulness.

Settlement agreements

If there has been a dispute, it may be resolved by a "settlement agreement". The Commissioner may, under the power of general administration, enter into a binding agreement with a taxpayer setting out the treatment of arrangements, both past and prospective.[29]

Such agreements, if well drafted, detail the arrangement that they cover in as much detail as a ruling. Any dispute about whether either party has breached the agreement is a matter for contract law.[30]

Settlement agreements offer certainty about treatment of future years, in a manner enforceable in a court but subject to the arrangement not being materially changed. They are, however, only available when there is an established dispute with the Commissioner that is to be compromised.

Advance pricing arrangements

An advance pricing arrangement (APA) is an arrangement between a taxpayer, the Commissioner and sometimes another foreign tax authority concerning the treatment of international transactions, agreements or arrangements between related parties or associates. The Commissioner may decide not to enter into an APA and the taxpayer has no simple statutory rights in relation to the decision.

APAs are not enforceable in an Australian court,[31] although they are generally believed to be respected by the Commissioner unless there is a material change in the facts of the taxpayer.

However, advance pricing arrangements lack some of the critical qualities of a private ruling, that is, a private ruling has an application process that may be reviewed by the courts, and a legislatively enforceable status.

Advance pricing arrangements are also limited to the future pricing of related party cross-border transactions and the profits that result from them.

Applications for declaratory relief

Declaratory relief is sometimes sought pursuant to s 39B of the *Judiciary Act 1903* and/or ss 21 and 22 of the *Federal Court of Australia Act 1976* (Cth). The remedy is discretionary and will not be given if the matter is one that would be more properly dealt with under Pt IVC (*Bellinz*). In effect, if there is an assessment in relation to the issue, Pt IVC is the appropriate mechanism.

In addition, a court will not generally engage with an issue that is "hypothetical".

Litigation under Pt IVC

A taxpayer may file a return on their preferred basis, object against any unfavourable treatment by the Commissioner, and then exercise their subsequent appeal rights under Pt IVC (or even file on the basis preferred by the Commissioner and then object against the resulting assessment). The result of an appeal, if successful, will be a legally enforceable decision.

Litigation generally requires a more detailed preparation of evidence than a ruling request, with the associated costs. The whole process may take a number of years depending on the levels of appeal but, provided the claims are properly structured and the appeal process is well run, comprehensive certainty can be the result. There are, however, still the usual risks of litigation and the greater costs.

One benefit of the litigation process is the flexibility and time for the parties to more fully explore the position and the relevant evidence, although this in turn creates some of the "litigation risk".

Conclusion

The key benefit sought in a ruling application is certainty on the application of the law to a scheme.

As discussed in the introduction to this article, a framework for considering the "worth" of something involves consideration of the following:

- utility (whether the outcome from the process was more useful than from competing processes);
- enjoyment (whether the experience was no more painful perhaps than other options, in the context of a tax question); and
- cost (whether the utility and enjoyment was such that you thought the cost worthwhile).

What does the discussion above tell us about these considerations?

Utility

Public rulings and oral rulings are not usually available for corporate taxpayers dealing with their own risk, and are not discussed further here.

The outcome of a successful private ruling binds the Commissioner in a legally enforceable way, as do the outcomes from Pt IVC litigation, declaratory relief and a

settlement agreement. Declaratory relief is available in a smaller range of situations, as are settlement agreements but, if a taxpayer fits their criteria, they might be considered of equal utility to a private ruling.

These solutions are not always available as alternatives, but must always be kept in mind. For instance, in an audit, it may be difficult to obtain a ruling on an issue which is presently subject to review. But in settling an audit, it is always worth considering what the totality of issues are that a taxpayer might value certainty on, and how the settlement document can be drafted so as to give it.

As noted above, an Australian APA is not generally legally enforceable.

Enjoyment

Preparation of a private ruling request which has maximum utility is obviously not always a simple task. Good legal analysis is required to identify the legal issue on which clarity will deliver the greatest benefit, and careful consideration is then required to identify the correct applicant, the relevant time period and a description of the scheme (*National Speakers Association*).

Consideration of the time period is important not only to the question of what period of coverage should be sought in a ruling, but also to the question of the value of a ruling in circumstances where changes can be foreseen (although not in precise detail). It certainly makes it important to consider and, where possible, foreshadow known future changes in the request.

We can see that a private ruling process may be appropriate if the legal issue is succinct and/or the relevant facts are able to be clearly stated and documented. In *Bellinz*, this led the court to observe that there were significant difficulties with a ruling on Pt IVA,[32] especially since one of the matters in s 177D(b) ITAA36 is "the manner in which the scheme was entered into or carried out". But even Pt IVA rulings are possible.

It is suggested that the ruling process is, however, simpler and shorter than litigation under Pt IVC. An application for declaratory relief probably falls between the two. A ruling application is likely equivalent to the effort in a well-framed settlement agreement, although part of the effort there is properly allocated to the fact of the audit itself.

It is worth noting that Pt IVC, settlement proceedings and declaratory relief are all subject to later changes in taxpayer fact patterns and the law.

Cost

Cost is a direct product of the complexity of process or "experience", so the lowest cost options for certainty are private rulings and settlement deeds. Provided the key threshold requirements are met, they may deliver real value.

If there are risks on the threshold requirements, other more expensive options may deliver better value.

After you apply

If, after this analysis, you decide to proceed with a private ruling request, there may still be reasons to withdraw later.

If the taxpayer and Commissioner cannot agree on the description of the arrangement, the appeal rights may be valueless (*McMahon*). In any event, any ruling that is issued should be carefully considered to ensure that it satisfies the formal requirements for a ruling and specifies the correct taxpayer and scheme.

The process itself may enable the taxpayer to determine whether these factors exist, and withdraw if it becomes apparent that another process may be more appropriate

Evan after getting a private ruling, be careful. Review the ruling at the time of filing each subsequent return that it applies to.

A private ruling will lose its value if there is a material change from the arrangement ruled on (*Mount Pritchard*).

When contesting an assessment where it is alleged that the Commissioner has not followed a ruling, it will be critical to adduce evidence about the arrangement ruled on and the fact that there has been no material change in circumstances.

The ruling will also lose its value if the law changes and the new law does not reflect or express the "same ideas" as the old.

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This article is an edited and updated version of "Private rulings: are they worth it?" presented at The Tax Institute's NSW Tax Forum held in Sydney on 19 to 20 May 2022.

References

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6 ATO, *Private ruling application* (NAT 749757). Available at www.ato.gov.au/forms/private-ruling-application-form.

7 See TR 2006/10 where the Commissioner discusses his approach to the question of whether the "same ideas" are preserved.

8 *Corporate Business Centres International Pty Ltd v FCT* [2004] FCA 458 at [54].

9 [2022] FCA 510.

10 [2022] FCA 510 at [104].

11 [1994] FCA 947.

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13 98 ATC 4634.

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16 97 ATC 5131 at 5134.

17 [2001] FCA 1836 at [44].

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19 97 ATC 4986. See also *Cooperative Bulk Handling Ltd v FCT* [2010] FCA 508, and *Eichmann v FCT* [2020] FCAFC 155 (approving the decision of the court below in *FCT v Eichmann* [2019] FCA 2155 at [21] and [22]).

20 97 ATC 4986 at 5003.

21 [2015] FCA 1231.

22 [2011] FCAFC 129.

23 The court did not elaborate on what "material" might mean.

24 [2002] FCA 1173 at [46].

25 [2022] FCA 368.

26 [2022] FCA 368 at [105].

27 [2022] FCA 368 at [105], citing *FCT v Futuris Corporation Ltd* [2008] HCA 32.

28 [2022] FCA 368 at [108].

29 *Grofam Pty Ltd v FCT* [1997] FCA 660, and s 8 of the *Income Tax Assessment Act 1936* (Cth) (ITAA36). See also PS LA 2015/1.

30 *Jonshagen v FCT* [2016] FCA 1545 at [83].

31 P McNab, "Could an Australian APA be enforced in a court?", (2014) 48(9) *Taxation in Australia* 514.

32 98 ATC 4634 at 4647.