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Dear Kevin

### **Reinvigorating the Public Rulings System for Income Tax**

In response to the discussion at 17 June 2009 NTLG meeting surrounding the Public Ruling Steering Committee update (Item 18) the Taxation Institute of Australia (**Taxation Institute**) has considered the public rulings program and the role of the steering committee in supporting the program. In particular the Taxation Institute's NSW Technical Committee (**Technical Committee**) canvassed a number of issues with a view to eliciting better value from the public rulings program. The following observations and suggestions are provided for the purposes of discussion at the NTLG Public Rulings Steering Committee's extraordinary meeting on 11 September 2009.

#### **Preliminary observations**

The Technical Committee shared the Australian Taxation Office's (**ATO**) concern at the apparent continuing decline of the income tax public rulings system, which plays a fundamental role in the self assessment system of providing certainty for taxpayers. The Technical Committee's view is that the rulings system is the principal means of communicating to the profession (and thus to taxpayers) its preferred view of the law on major (and minor) technical issues.

This decline in public rulings dealing with income tax issues is illustrated in the table below. Even at this stage of the year it seems clear that the number of rulings to be released in 2009 will be quite low. This continues the trend seen in prior years:

	<b>Draft TRs</b>	<b>Draft TDs</b>
2009	3 (to date)	4 (to date)
2008	8	19
2007	11	23
2006	12	46

The decline is difficult to rationalise given the enormous legislative programs of the last 8-10 years (eg, debt-equity, consolidation, TOFA, Div 250, forex, 165-CD, Div 240, thin capitalisation, capital allowances, black hole regime) there is certainly enough new legislation requiring clarification and for which the rulings system is the ATO's appropriate tool. The Technical Committee considered a number of possible reasons for that decline. Regardless of the actual causes there was a perception that in part the strict processes adopted for prioritising public rulings in the past had:

- led to the shelving or the rejection of a number of important issues which, in relative terms to the issues under consideration at the time, were considered of lower importance; and
- created a reluctance within the profession to invest resources in identifying issues given that it was too difficult to get issues on to the program.

The Technical Committee then focused on identifying a range of areas which could assist in the identification of issues for the future.

### Potential sources of topics

There is a very big list of unresolved issues appearing in the minutes of the various NTLG subcommittees which could be the subject of rulings. For example, the Trusts Subcommittee minutes disclose a variety of issues, including:

- solving the problems of the definition of 'fixed entitlement' in the trust loss rules;
- solving the problems of the definition of 'fixed entitlement' for the claiming of franking credits;
- the effect of the trustee's indemnity on the meaning of absolute entitlement;
- the allocation of trust expenses against various classes of income in light of the removal of s. 50;
- the interaction of TFN and MIT withholding;
- the interpretation adopted by the ATO in ATOID 2005/200.

This situation seems common for other Subcommittees. For example, despite having a full agenda of fringe benefits tax (**FBT**) issues, there are no FBT rulings listed. These lists of issues should be subjected to a stock take review within the subcommittees to identify whether the issues raised should be elevated to the public rulings program or dealt with by another precedential product.

To ensure this review process occurs as a matter of course in the future, subcommittees could include, as a standard agenda item a requirement that all resolved issues be evaluated for potential inclusion in the public rulings program or be dealt with by another precedential product. This would be evidenced by an "action point" at the end of the discussion notes in respect of each agenda item, or a "no further action required" note. This would make it clear to the reader what, if anything is going to happen as a result of the issue being raised and an answer being provided.

A second source could be the large number of ATOIDs on related topics in areas where there are no Public Rulings. These could be consolidated into compendium rulings. An example is s 40-880 *Income Tax Assessment Act 1997 (ITAA 97 Act)*. There have been 31 ATOIDs released in 2007-2009 on various matters arising under s 40-880, yet no ruling has been issued. This is an area which is relatively recent legislation on which there is very little guidance and which has obviously caused considerable taxpayer uncertainty. It is an area on which an ATO ruling would be welcomed.

A third source could be where draft Rulings have issued, but have been subsequently withdrawn without apparent resolution. For example:

- TR 2007/D10 - Income tax: capital gains: capital gains tax consequences of earnout arrangements;
- TR 2004/D25 - Income tax: capital gains: meaning of the words 'absolutely entitled';
- TR 2002/D13 (Withdrawn) - Income tax: assessability of statutory personal injury compensation scheme payments [waiting on Brackenreg];
- TR 1999/D1 (Withdrawn) - Income tax and fringe benefits tax: meaning of 'personal injury'; and
- TD 2007/D5 Income tax: does the single entity rule apply for s 47.

Other sources could be:

- Private binding ruling requests;
- Common problems seen in audits; and
- Telephone inquiries.

Finally, there are a number of perennial issues that need to be addressed:

- What is the interaction between s 23AJ and s 23AH and which takes precedence?
- What is meaning of the words 'gives rise to debt deduction of the entity for that or any other year in the thin capitalisation rules?
- How is continuity of ownership to be determined where there are shares on issue with different rights e.g. redeemable preference shares?
- In what circumstances would the taxpayer be able to satisfy the 'reasonable to assume' test in s 165-150, s 165-155 and s 165-160?
- In what circumstances will the Commissioner treat the disposal of rights under a contract as a CGT event (based on *Orica*)?
- In what circumstances would the 'related scheme' rules in Division 974 apply?
- What is the meaning of the words 'required to pay' in s 110-25 and 'entitled to receive' in s. 116-20?
- How do the various 'associate' tests apply where an entity becomes an associate during the year?

### **Conclusion**

The above observations, list of topics and sources for further topics is provided to facilitate discussion of agenda items 2 and 3 at the NTLG Public Steering Committee meeting on 11 September 2009 and may be circulated to all attendees. If you wish to discuss any aspect of the above prior to the meeting please contact the Taxation Institute's President, Joan Roberts on 03 9611 0178 or the Senior Tax Counsel, Dr Michael Dirkis, on 02 8223 0011.

Yours sincerely



Joan Roberts