TD 2011/19EC - Compendium

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The edited version of the Compendium of Comments is a Australian Taxation Office (ATO) communication that is not intended to be relied upon as it provides no protection from primary tax, penalties, interest or sanctions for non-compliance with the law. In accordance with PS LA 2008/3 it only affords level 3 protection.

Ruling Compendium – TD 2011/19

This is a compendium of responses to the issues raised by external parties to draft Taxation Determination TD 2011/D4 – Tax administration: what is a general administrative practice for the purposes of protection from administrative penalties and interest charges?

This compendium of comments has been edited to maintain the anonymity of entities that commented on the draft ruling.

Summary of issues raised and responses

Issue No.	Issue raised	ATO Response/Action taken
1	It is disappointing that the draft Determination has not acknowledged that particular documents represent the ATO's 'general administrative practice'. It is considered that the draft Determination does not assist taxpayers in determining whether or not the ATO is aware of, and has accepted, a practice adopted by taxpayers. This situation would be improved if the ATO accepted that certain documents represented the ATO's general administrative practice.	The ATO considers that a publication may evidence a general administrative practice. However, it is the consistent actions of the Commissioner in an appropriate number of instances that determine the existence or otherwise of a general administrative practice, not the existence of a particular document. This issue was raised by the Inspector General of Taxation (IGOT) in his 2009 Review of the Tax Office's administration of public binding advice. In accordance with a recommendation by the Inspector-General, the ATO sought legal advice on the meaning of general administrative practice. In preparing this Determination the ATO has taken the legal advice received into account. The draft has been updated to clarify that protection from penalties and interest may arise where a taxpayer relies in good faith on a publication approved in writing by the Commissioner, even where that publication does not establish a general administrative practice. Paragraph 4 and new Example 3 have been inserted into the Determination to make this clearer.

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2	There is a perception of inconsistency between paragraphs 4 and 34. Paragraph 4 of the draft Determination states that a: … general administrative practice is not established by mere silence by the Commissioner, a failure to issue a ruling or provide other public advice or guidance in relation to an issue, or delay in providing such advice or guidance where a taxpayer practice is under review. Paragraph 34 of the draft Determination however, states that: … the Commissioner could not simply avoid responding to relevant matters drawn to the ATO's attention and then argue that the practice is therefore not accepted. If, for example, a practice was drawn to the attention of the ATO's most senior employees on successive occasions with the purpose of eliciting a response from the Commissioner as to his/her acceptance of the practice, the Commissioner might be found to have accepted the practice if he/she failed to respond in any way but continued to administer the relevant tax laws consistently with the relevant taxpayer practice. On first reading these paragraphs a perception of inconsistency arises – for example, in paragraph 4 'silence' by the Commissioner' is stated as not being capable of establishing a general administrative practice whereas in paragraph 34 a failure 'to respond in any way' (that is, silence) is acknowledged to be a possible way in which a general administrative practice can arise. We believe that any perceptions of inconsistency between these paragraphs could be dispelled if paragraph 4 was revised along the following lines: 4. A general administrative practice is not established by: (a) mere silence by the Commissioner; (b) the mere failure to issue a ruling or provide other public advice or guidance in relation to an issue; or (c) a mere delay in providing advice or guidance where a taxpayer practice is under review.	Submission accepted and wording of paragraph 3 of the Determination updated.

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3	We believe that more examples are needed, preferably in the Ruling section of the draft Determination, to show advisers and taxpayers when the ATO will/will not regard a general administrative practice as having being established. Further examples might be drawn from the IGOT's second report.	The Determination has been updated to provide an additional example – which outlines a situation where an ATO ID has issued but no general administrative practice has been established.
4	For the sake of completeness, it is flagged that the relationship between concepts such as 'general administrative practice', 'general guidance' and 'legally binding advice' continue to be not as clear as they should be.	This general comment does not impact on this particular Determination. However the point it raises is noted, and will be considered in a future update of *Law Administration Practice Statement PS LA 2008/3 Provision of advice and guidance by the ATO*.