

***Commissioner of Taxation v Hacon Pty Ltd -***


# Decision Impact Statement

## COMMISSIONER OF TAXATION v. HACON PTY LTD

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| <b>Court Citation (s):</b> | [2017] FCAFC 181                    |
| <b>Venue:</b>              | Full Federal Court                  |
| <b>Venue Reference No:</b> | QUD 328 of 2017                     |
| <b>Judges Name(s):</b>     | ROBERTSON, PAGONE AND DERRINGTON JJ |
| <b>Judgment date:</b>      | 23 November 2017                    |
| <b>Appeals on foot:</b>    | No                                  |
| <b>Decision outcome:</b>   | Favourable to the Commissioner      |

### Impacted advice

PS LA 2008/3 *Provision of advice and guidance by the ATO*

 The ATO is reviewing the impact of this decision on related advice and guidance products.

### Précis

The matter was a judicial review of the Commissioner's decision to decline to make a private ruling.

The decision concerns the ability of the Commissioner to exercise his discretion to decline to make a private ruling where the correctness of the ruling would depend on assumptions about future events or other matters. The decision also concerns the interaction between the Commissioner's discretion to so decline and the statutory obligation imposed on the Commissioner to request further information from the ruling applicant.

### Brief summary of facts

The taxpayers applied for a private ruling on the application of Part IVA of the *Income Tax Assessment Act 1936* (ITAA 1936) to a proposed restructure of their business.

The Commissioner exercised his discretion under paragraph 357-110(1)(a) of Schedule 1 of the *Taxation Administration Act 1953* (TAA 1953) to decline to make a private ruling where the correctness of the ruling would depend on which assumptions were made about a future event or other matter.

In a letter setting out the reasons for his decision to decline to rule, the Commissioner identified a non-exhaustive list of events and matters about which he considered he would have to make assumptions in order to correctly make the private ruling.

The taxpayers applied to the Federal Court for judicial review of the Commissioner's decision. Justice Logan decided the matter in favour of the taxpayers, determining that the Commissioner's letter (together with an earlier letter) evidenced that the Commissioner considered he needed further information to make the private ruling. Accordingly, Justice

Logan held that the Commissioner was required to request that information under subsection 357-105(1) of Schedule 1 to the TAA 1953 and failing to do so was an error of law for the purposes of the *Administrative Decisions (Judicial Review) Act 1977* and also a jurisdictional error for the purposes of section 39B of the *Judiciary Act 1903*.

The Commissioner was successful in his appeal of the matter to the Full Federal Court.

## **Issues decided by the Court**

### **Assumptions in making a private ruling**

The primary issue before the Full Court was whether the Commissioner was entitled to exercise his discretion under paragraph 357-110(1)(a) of Schedule 1 of the TAA 1953 to decline to make a ruling or whether he was instead required to request further information from the taxpayers pursuant to subsection 357-105(1) of Schedule 1 of the TAA 1953.

The Full Court determined that the obligation in subsection 357-105(1) required the Commissioner to request information from a taxpayer only where the absence of that particular information would otherwise prevent the making of the private ruling. However, the Full Court considered that the obligation to request information did not arise in circumstances where the Commissioner considered the correctness of a private ruling would depend on assumptions about future events or other matters. In those circumstances the Commissioner was entitled either to make those assumptions or to exercise his discretion to decline to rule.

In reaching its conclusion, the Full Court found that each of the seven matters identified in the Commissioner's decision letter may well have been information. However, none of those matters, either individually or collectively, were information of the kind referred to by the words of subsection 357-105(1). That is, although the matters were information, they were not 'information required to make a private ruling' because they were also assumptions about either a future event or other matter and the Commissioner's discretion to decline to rule under paragraph 357-110(1)(a) was therefore enlivened. In other words, subsection 357-105(1) operates, in effect, subject to paragraph 357-110(1)(a).

In reaching this conclusion the Full Court considered there was no strict dichotomy between the word 'information' in subsection 357-105(1) and the word 'assumptions' in paragraph 357-110(1)(a). The word 'information' could include both facts yet to occur and assumptions about future events. Similarly, there was no reason to read 'assumptions' as being limited to events or matters that do not yet exist or are unknown.

### **Effectiveness of an application for private ruling**

By way of *obiter dictum*, the Full Court rejected an alternative argument advanced by the Commissioner that he was entitled not to deal with the private ruling application on the basis that it did not ask the Commissioner to rule on how he considered a relevant provision would apply to a particular person.

The Full Court considered that an application for private ruling will not of itself be ineffective merely because the Commissioner requires something more to make the ruling requested by the applicant. An application for private ruling is effective if the Commissioner is able to deal with it. In the present case, the Commissioner was able to, and did, deal with the application by way of communicating to the taxpayer the difficulties that he perceived and then giving the taxpayer an opportunity to address those difficulties.

## **ATO view of decision**

The decision confirms the Commissioner's view that he is entitled to decline to make a private ruling where the correctness of the ruling would depend on assumptions about future events or other matters, and that the Commissioner is not obligated to first request that information from the taxpayer in those circumstances.

## **Implications for impacted advice or guidance**

The ATO currently intends to publish further guidance for tax officers about the Commissioner's discretion to decline to make a private ruling.

The ATO considers that, where possible, taxpayers should be provided with certainty in respect of prospective arrangements. However, in some circumstances, such as where the application of the law is particularly dependent on assumptions about future events or matters (for example, section 177D of the ITAA 1936) a private ruling may not be an appropriate way for the Commissioner to provide the taxpayer with certainty.

## **Comments**

We invite you to advise us if you feel this decision has consequences we have not identified, or if a precedential decision such as a Public Ruling or an ATO ID requires reconsideration or amendment. Please forward your comments to the contact officer.

**Date issued:** 14 September 2018

Contact officer details have been removed as the comments period has expired

### **Legislative references:**

*Taxation Administration Act 1953*  
Schedule 1  
Subsection 357-105(1)  
Paragraph 357-110(1)(a)

*Income Tax Assessment Act 1936*  
Part IVA  
Section 177D

*Administrative Decisions (Judicial Review) Act 1977*

*Judiciary Act 1903*  
Section 39B

### **Case references:**

*Bellinz v. Commissioner of Taxation (Cth)*  
(1998) 84 FCR 154

*Corporate Business Centres International Pty Ltd v. Federal Commissioner of Taxation*  
[2004] FCA 458

(2004) 137 FCR 108

*CTC Resources NL v. Commissioner of Taxation*  
(1994) 48 FCR 397

*Lamont v. Federal Commissioner of Taxation*  
[2005] FCA 513  
(2005) 144 FCR 312

*Nicovations Australia Pty Ltd v. Secretary, Department of Health*  
[2016] FCA 394  
(2016) 338 ALR 429

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