

# ***PS LA 2003/3 - Precedential ATO view***

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**FOI status: may be released**

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*This practice statement is issued under the authority of the Commissioner of Taxation and must be read in conjunction with Law Administration Practice Statement PS LA 1998/1. It must be followed by tax officers unless doing so creates unintended consequences or is considered incorrect. Where this occurs tax officers must follow their business line's escalation process.*

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**SUBJECT:** Precedential ATO view

**PURPOSE:** To advise:

- what is a precedential ATO view
- when tax officers must identify and apply a precedential ATO view
- when tax officers are not required to identify and apply a precedential ATO view
- who can create a precedential ATO view
- who is responsible for maintaining the currency, accuracy and consistency of precedential ATO view documents

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| <b>TABLE OF CONTENTS</b>   | <b>Paragraph</b> |
|--|------------------|
| <b>STATEMENT</b>   | <b>1</b>         |
| What is a precedential ATO view?   | 1                |
| When tax officers must identify and apply the precedential ATO view              | 8                |
| When a new precedential ATO view must be created                                 | 12               |
| Who can create a precedential ATO view   | 15               |
| When tax officers are not required to identify and apply a precedential ATO view | 16               |
| <i>Decisions that involve a straightforward application of the law</i>           | 17               |
| <i>Example 1</i>   | 18               |
| <i>Example 2</i>   | 19               |
| <i>Exercise of a discretion</i>  | 20               |
| <i>Ultimate conclusion of fact</i>   | 26               |
| <i>Example 3</i>   | 29               |

Who is responsible for maintaining the currency, accuracy and consistency of precedential ATO view documents?

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## STATEMENT

### What is a precedential ATO view?

1. A precedential ATO view is the ATO's documented view about the application of any of the law administered by the Commissioner in relation to a particular interpretative issue. Law administered by the Commissioner includes law governing income tax, indirect taxes, fringe benefits tax, resource rent taxes, withholding taxes, superannuation and excise.
2. An interpretative issue is one that arises because:
  - the meaning of the words of the legislation are not clearly evident from a plain reading of the legislation
  - there is more than one possible interpretation of the legislation, or
  - an interpretation based on the ordinary meaning of the legislation produces a result that is obviously absurd or unreasonable and does not promote the purpose of the legislation.
3. Resolution of an interpretative issue requires that the meaning of the words of the legislation be determined so that the legislation can be applied to a set of facts. Tax officers should adopt a purposive approach to the interpretation of legislation, to ensure that, to the extent that it is possible to do so, the underlying policy intent of the legislation is achieved.<sup>1</sup>
4. Precedential ATO views are the linchpins of the ATO's approach to interpretative decision-making. The requirement for tax officers to search for and apply ATO views ensures that ATO decisions on interpretative issues are accurate and consistent. Tax officers must use relevant information technology systems in use in the ATO for research, including searching for precedential ATO views.<sup>2</sup>
5. Precedential ATO views are set out in the following documents:
  - public rulings within Division 358 of Schedule 1 to the *Taxation Administration Act 1953* (TAA)<sup>3</sup>
  - other publicly issued rulings<sup>4</sup>
  - draft public rulings and other publicly issued draft rulings
  - ATO Interpretative Decisions (ATO IDs)<sup>5</sup>
  - decision impact statements, and
  - documents listed in the Schedule of documents containing precedential ATO views.

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<sup>1</sup> See section 15AA of the *Acts Interpretation Act 1901*.

<sup>2</sup> See *PS LA 2002/16 Mandatory use of Information Technology systems for interpretative work – inclusion in performance agreements*.

<sup>3</sup> Division 358 of Schedule 1 to the TAA allows the Commissioner to make public rulings on those provisions listed in section 357-55 of Schedule 1 to the TAA. Refer to TR 2006/10 Income tax: public rulings. Public rulings include class and product rulings and determinations.

<sup>4</sup> These are not public rulings within the meaning of Division 358. They include, for example, Income Tax Rulings (IT), Miscellaneous Tax Rulings (MT), Superannuation Guarantee Rulings (SGR) and Superannuation Contributions Rulings (SCR). See paragraph 23 of TR 2006/10 Public Rulings.

<sup>5</sup> For more information on ATO IDs refer to *PS LA 2001/8 ATO Interpretative Decisions*.

A hyperlink to the Schedule of documents containing precedential ATO views is contained in the Other References section at the conclusion of this document.

6. All of these documents are available on ATOLaw. They are also made publicly available on the Legal Database on the ATO website at [www.ato.gov.au](http://www.ato.gov.au).
7. While it is central to the decision on an interpretative issue, a legislative provision<sup>6</sup> itself does not constitute a precedential ATO view. However, a legislative provision should be cited as authority for a decision if it involves a straightforward application of the legislative provision (see paragraph 17 of this practice statement).

### **When tax officers must identify and apply the precedential ATO view**

8. In making decisions about interpretative issues, such as those which arise in requests for private rulings, tax officers must:
  - identify the issue, relevant legislative provisions or case law
  - search for and identify the relevant precedential ATO view, and
  - apply the precedential ATO view if there is no material difference<sup>7</sup> between the facts of the particular case and the facts outlined in the precedential ATO view document, or
  - seek engagement of appropriate technical officers on the issue if:
    - there is no precedential ATO view, or
    - the application of the existing precedential ATO view is considered to result in an incorrect decision or unintended outcome, or
    - there is a significant alternative view to the precedential ATO view.
9. Before applying the precedential ATO view, tax officers are required to determine whether there are circumstances which would make it appropriate to take action to apply the ATO view of the law only on a prospective basis.<sup>8</sup>
10. Tax officers who authorise or approve decisions on interpretative issues arising from advice requests, audits or disputes must check that the precedential ATO view cited by the case officer is appropriate. Tax officers must follow the policy and procedures outlined in the Online Resource Centre for Legal Administration (ORCLA) and elsewhere for recording in the relevant case management system the source of the precedential ATO view (or relevant ATO guidelines) that they have applied in making a decision.
11. Where a tax officer is unable to decide whether or not a precedential ATO view applies to the facts associated with the particular issue, assistance must be sought from technical leaders within the business line. If the level of risk warrants it, tax technical officers in Law and Practice may also be engaged.<sup>9</sup>

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<sup>6</sup> This includes regulations and other legislative instruments including legislative determinations.

<sup>7</sup> See paragraphs 8 to 15 of *PS LA 2001/8 ATO Interpretative Decisions* for an explanation of when there is no material difference.

<sup>8</sup> See *PS LA 2011/27 Matters the Commissioner considers when determining whether the Australian Taxation Office (ATO) view of the law should only be applied prospectively*.

<sup>9</sup> See *PS LA 2012/1 Management of high risk technical issues and engagement of tax technical officers in Law and Practice*

### **When a new precedential ATO view must be created**

12. If there is no precedential ATO view for a particular interpretative issue, or a decision has been made that an existing precedential ATO view is incorrect, a precedential ATO view must be created. However, there are some decisions that do not require a precedential ATO view to be identified and applied. This is explained at paragraphs 17 to 31 of this practice statement.
13. If it is proposed to publish a new precedential ATO view that will overturn an existing precedential ATO view or an existing general administrative practice<sup>10</sup> this matter must be brought to the attention of the relevant Deputy Chief Tax Counsel (DCTC).<sup>11</sup>
14. Tax officers must seek assistance from technical leaders within the business line to create a new precedential ATO view. If the level of risk warrants it, tax technical officers in Law and Practice may also be engaged.<sup>12</sup>

### **Who can create a precedential ATO view**

15. Authority to create a particular precedential ATO view is established by the relevant product policy, for example the Public Rulings Manual for public rulings and *PS LA 2001/8 ATO Interpretative Decisions* for ATO IDs.

### **When tax officers are not required to identify and apply a precedential ATO view**

16. Tax officers do not have to identify and apply a precedential ATO view where the decision:
  - involves a straightforward application of the law
  - involves the exercise of a discretion
  - involves making an ultimate conclusion of fact, or
  - involves determining the value of something.

### ***Decisions that involve a straightforward application of the law***

17. Tax officers do not have to identify and apply a precedential ATO view where the decision involves a straightforward application of the law to a particular set of facts.

18. ***Example 1***

A private ruling request raises the following issue.

*Can I claim a tax deduction for a gift of \$20 to Amnesty International Australia?*

Section 30-15 of the *Income Tax Assessment Act 1997* (ITAA 1997) provides that a gift of money to a fund, authority or institution listed in a relevant table is deductible. Amnesty International Australia is listed in the table in

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<sup>10</sup> See *TD 2011/19 Tax administration: what is a general administrative practice for the purposes of protection from administrative penalties and interest charges?*.

<sup>11</sup> Refer to *PS LA 2011/27 Matters the Commissioner considers when determining whether the Australian Taxation Office (ATO) view of the law should only be applied prospectively* and *PS LA 2012/1 Management of high risk technical issues and engagement of tax technical officers in Law and Practice*.

<sup>12</sup> See *PS LA 2012/1 Management of high risk technical issues and engagement of tax technical officers in Law and Practice*

subsection 30-45(2) of the ITAA 1997. As the application of the law is straightforward, it is not necessary for the tax officer dealing with the issue to identify a precedential ATO view and the relevant legislative provision can be cited as authority for the decision.

19. **Example 2**

The following issue arises in the course of an audit.

*Is an amount of family tax benefit paid to the taxpayer included in their assessable income?*

Under subsection 52-150(1) of the ITAA 1997, 'A payment of ... family tax benefit ... is exempt from income tax.' Section 6-20 and subsection 6-15(2) of the ITAA 1997 then operate to exclude exempt income from assessable income. As the application of the law is straightforward, it is not necessary for the tax officer dealing with the issue to identify a precedential ATO view and the relevant legislative provisions can be cited as authority for the decision.

**Exercise of a discretion**

20. Tax officers are not required to identify and apply a precedential ATO view for a decision (or that part of a decision) involving the exercise of a discretion. However, tax officers are required to take into account any relevant ATO guidelines.
21. An instance of a decision involving the exercise of a discretion is a decision about whether or not to exercise a power; for example, whether or not to allow an extension of time for the lodgment of an objection (see subsection 14ZX(1) of the TAA). Another example is a decision in response to a private ruling request asking the Commissioner to exercise a particular discretion.
22. Exercising a discretion requires a decision-maker to choose between alternative courses of action. It involves the exercise of the decision-maker's own judgment in coming to an appropriate decision and the decision must not be made at the direction of another person. Generally, it is a decision-making process in which no one consideration and no combination of considerations is necessarily determinative of the result.<sup>13</sup> It requires the decision-maker to consider the merits of the particular case by:
  - taking into account the individual circumstances of the case
  - weighing up the relevant evidence, and
  - taking into account any relevant guidelines.
23. Guidelines developed for the exercise of a discretion may be contained in publicly issued rulings. For example, Taxation Ruling TR 2001/14 provides guidance on exercising the discretion under section 35-55 of the ITAA 1997 to not defer the deduction of a loss.
24. ATO guidelines for the exercise of a discretion may also be contained in other documents such as law administration practice statements. For example, *PS LA 2003/7 Taxation objections – late lodgment* provides guidance for tax officers who are required to make decisions in response to requests by taxpayers for the Commissioner to extend the time for the lodgment of an objection.

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<sup>13</sup> *Jago v. The District of New South Wales and Others* (1989) 168 CLR 23 at pages 75-76. See also *Coal and Allied Operations Pty Limited v. Australian Industrial Relations Commission and Others* (2000) 203 CLR 194 at pages 204 to 205.

25. Where tax officers are required to make a decision involving the exercise of a discretion regarding the application of a general anti-avoidance provision such as Part IVA, they should follow the decision-making process outlined in *PS LA 2005/24 Application of general anti-avoidance rules*.

### ***Ultimate conclusion of fact***

26. Under section 359-5 of Schedule 1 to the TAA, the Commissioner may make a private ruling about any matter involved in the application of a relevant provision<sup>14</sup>. This means that a private ruling can be made about an ultimate conclusion of fact for the purposes of the application of a relevant provision.
27. Tax officers are not required to identify and apply a precedential ATO view for a decision (or that part of a decision) that involves making an ultimate conclusion of fact. However, tax officers are required to take into account any relevant ATO guidelines. These guidelines may be contained in publicly issued rulings or other ATO documents including, for example, law administration practice statements.
28. An ultimate conclusion of fact involves ascertaining the relevant facts and drawing a conclusion from those facts. It may also involve the application of appropriate guidelines or indicators.

29. ***Example 3***

*Is a taxpayer carrying on a business of primary production?*

An ultimate conclusion of fact that a taxpayer is carrying on a business of primary production involves ascertaining the relevant facts. These facts may include that the taxpayer owns a property of a certain size on which there are a certain number of livestock. It is also necessary to identify and apply any relevant ATO guidelines. The relevant ATO guidelines are in *Taxation Ruling TR 97/11 Income tax: am I carrying on a business of primary production?* All the relevant facts need to be taken into account having regard to the indicators set out in TR 97/11 that are relevant to making a decision about whether or not a person is carrying on a business of primary production.

30. No two cases will be exactly the same as different facts and indicators may need to be considered in reaching a conclusion. Accordingly, these are decisions that must be made on the facts of each case, having regard to any relevant ATO guidelines rather than by applying a precedential ATO view.

### ***Valuations***

31. When making a decision in a private ruling about the application of a relevant provision<sup>15</sup> that requires the determination of the value of something, it is not necessary for the tax officer to apply a precedential ATO view for that part of the decision related to the valuation. Tax officers should follow the policy and procedures in ORCLA and elsewhere that deal with valuation matters.

### **Who is responsible for maintaining the currency, accuracy and consistency of precedential ATO view documents?**

32. In accordance with the requirements of paragraphs 8 to 11 of this practice statement, all tax officers involved in the interpretation and application of the

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<sup>14</sup> A relevant provision is a provision listed in section 357-55 of Schedule 1 to the TAA.

<sup>15</sup> A relevant provision is a provision listed in section 357-55 of Schedule 1 to the TAA.

law have a responsibility toward maintaining the currency, accuracy and consistency of precedential ATO view documents.

33. Business lines must have in place processes and procedures for ensuring that precedential ATO view documents are reviewed and updated in a timely manner, including cross business line consultation where appropriate.
34. Authors of new precedential ATO view documents must check the currency, accuracy and consistency of related precedential ATO view documents. They must withdraw any of these documents identified as being outdated, specifying the reason for their withdrawal, and link them, where appropriate, to the new precedential ATO view document(s).
35. Law and Practice has responsibility for oversight of the ATO's precedential system as established by this practice statement. This includes ensuring that business lines have processes and procedures in place and operating to ensure that precedential ATO view documents are reviewed and updated in a timely manner, and that the precedential system as a whole is operating effectively.



## Amendment history

| Date of amendment | Part   | Comment  |
|-------------------|--|--|
| 21 May 2012       | Throughout   | Updated to <ul style="list-style-type: none"> <li>- reflect the replacement of the requirement to escalate precedential issues to Centres of Expertise with the new rules for engagement of tax technical officers in Law and Practice set out in PS LA 2012/1</li> <li>- update the responsibilities for maintenance of the ATO view</li> <li>- clarify the requirement for accreditation to create a precedential ATO view</li> <li>- delete material which was merely a replication of policy stated elsewhere, ie the protection afforded by precedential ATO view documents, which is set out now in PS LA 2008/3</li> <li>- more logically reorder material and remove duplication.</li> </ul> |
| 10 April 2012     | Contact details  | Updated.   |
| 28 July 2011      | Paragraph 6A   | Inserted to reflect additional requirement to consider whether previous ATO publications or conduct could have reasonably conveyed a different view on a particular issue – see PS LA 2011/27.   |
|                   | References   | Inserted reference to PS LA 2011/27  |
| 11 October 2010   | Paragraph 3 and footnotes 2, 3 (deleted), 4, 10, 11 (deleted), 12, 24 and 27 | Amended to reflect measures in the <i>Tax Laws Amendment (2010 GST Administration Measures No. 2) Act 2010</i> to include indirect tax rulings in the general rulings regime.  |
| 23 July 2009      | References   | Remove reference to PS LA 2001/4 and insert PS LA 2008/3.  |
| 29 February 2008  | Paragraph 3  | Dot points added.  |

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|--------------------------------|--|
| Subject references             | ATO Interpretative decisions<br>Commissioner' discretion<br>precedential ATO views<br>private rulings<br>public rulings<br>Schedule of documents containing precedential ATO views   |
| Legislative references         | TAA 1953 8(1)<br>TAA 1953 8AAB<br>TAA 1953 14ZX(1)<br>TAA 1953 37<br>TAA 1953 Sch 1 280-100(1)<br>TAA 1953 Sch 1 Div 284<br>TAA 1953 Sch 1 284-215(1)(b)(iii)<br>TAA 1953 Sch 1 357-55<br>TAA 1953 Sch 1 Div 358<br>TAA 1953 Sch 1 358-10(2)<br>TAA 1953 Sch 1 359-5<br>TAA 1953 Sch 1 361-5(1)<br>ITAA 1936 177A(1)<br>ITAA 1997 6-15(2)<br>ITAA 1997 30-15<br>ITAA 1997 30-45(2)<br>ITAA 1997 Div 35<br>ITAA 1997 35-55<br>ITAA 1997 52-150(1)<br>ITAA 1997 995-1(1)<br>AIA 1901 15AA<br>Excise Act 1901<br>Excise Tariff Act 1921<br>Fuel Tax Act 2006<br>PGBA Act 2000 8<br>Superannuation Guarantee (Administration) Act 1992 Pt 7<br>Superannuation Guarantee (Administration) Act 1992 31 |
| Related public rulings         | GSTR 2000/17; TR 97/11; TR 2001/14; TR 2006/10;<br>TD 2011/19  |
| Related practice statements    | PS LA 1998/1; PS LA 2001/8; PS LA 2002/16; PS LA 2003/3;<br>PS LA 2003/7; PS LA 2004/4; PS LA 2004/11, PS LA<br>2005/24; PS LA 2008/3; PS LA 2011/27, PS LA 2012/1   |
| Case references                | Coal and Allied Operations Pty Limited v. Australian Industrial<br>Relations Commission and Others (2000) 203 CLR 194<br>Jago v. The District of New South Wales and Others (1989)<br>168 CLR 23   |
| Other references               | Explanatory Memorandum to the Tax Laws Amendment<br>(Improvements to Self Assessment) Bill (No. 2) 2005<br><a href="#">Schedule of documents containing precedential ATO views</a>   |
| File references                | 2001/7447; 1-25G6G6Z   |
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| Other business lines consulted | All  |