


PS LA 2015/3 - Approval process for the application of subsections 815-130(2) to 815-130(4) of the Income Tax Assessment Act 1997

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 This document has changed over time. This version was published on *24 January 2025*



Practice Statement Law Administration

PS LA 2015/3

This Practice Statement is an internal ATO document and an instruction to ATO staff.

Taxpayers can rely on this Practice Statement to provide them with protection from interest and penalties in the following way. If a statement turns out to be incorrect and taxpayers underpay their tax as a result, they will not have to pay a penalty, nor will they have to pay interest on the underpayment provided they reasonably relied on this Practice Statement in good faith. However, even if they do not have to pay a penalty or interest, taxpayers will have to pay the correct amount of tax provided the time limits under the law allow it.

SUBJECT: Approval process for the application of subsections 815-130(2) to (4) of the *Income Tax Assessment Act 1997*

PURPOSE: To provide guidance to ATO staff on this process.

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SCOPE

1. This Practice Statement provides guidance to ATO staff on the approval process specified where the Commissioner relies on subsections 815-130(2) to (4) of the *Income Tax Assessment Act 1997* (ITAA 1997) to identify arm's length conditions in relation to cross-border transfer pricing.
2. All legislative references in this Practice Statement are to the ITAA 1997, unless otherwise indicated.
3. This Practice Statement should be read in conjunction with Taxation Ruling TR 2014/6 *Income tax: transfer pricing – the application of section 815-130 of the Income Tax Assessment Act 1997*, which provides guidance in respect of the application of section 815-130.
4. This Practice Statement does not apply in instances where you are merely re-pricing an entity's actual conditions in accordance with the 'basic rule' in subsection 815-130(1) rather than seeking to rely on one of the exceptions at subsections 815-130(2) to 815-130(4).

BACKGROUND

5. Subdivision 815-B was introduced by the *Tax Laws Amendment (Countering Tax Avoidance and Multinational Profit Shifting) Act 2013*, which inserted

Subdivisions 815-B, C and D into the ITAA 1997 and Subdivision 284-E into Schedule 1 to the *Taxation Administration Act 1953*, with effect from 29 June 2013.¹ These Subdivisions ensure that Australia's transfer pricing rules better align with the arm's length principle and the internationally consistent transfer pricing approaches as set out by the Organisation for Economic Co-operation and Development (OECD).²

6. Subsection 815-130(1) provides the 'basic rule' for the way in which an entity's arm's length conditions are to be identified, that is, that they be based on the commercial or financial relations in connection with which the actual conditions operate and have regard to both the form and substance of those relations. Subsections 815-130(2) to (4) ('the exceptions') provide exceptions to that rule depending on whether the form and substance of those relations is consistent or on what independent entities dealing wholly independently with one another in comparable circumstances would or would not have done. (See paragraph 29 of TR 2014/6.)
7. The operation of the basic rule, the exceptions to that rule, the meaning of the terms in section 815-130 and its interaction with other parts of Subdivision 815-B are discussed in TR 2014/6.
8. Paragraph 30 of TR 2014/6 states that these exceptions operate automatically. There is no discretion with their application if the circumstances described in the exceptions apply in relation to the actual commercial or financial relations. In particular, section 815-130 neither requires nor contemplates the existence of any other exceptional circumstances, nor any subjective analysis in this regard, before the exceptions apply. Rather, the exceptional circumstances required for their operation are strictly defined within these subsections.

STATEMENT

9. In considering whether any of the exceptions to the basic rule in section 815-130 may apply to an entity in a particular instance, you must:
 - engage relevant internal technical experts as early as possible
 - notify the branch responsible for transfer pricing strategy within Public Groups (PG)
 - notify the Economist Practice.
10. The notifications listed in paragraph 9 of this Practice Statement should occur before any views are communicated to the taxpayer that consider the potential or proposed application of the exceptions to the basic rule in section 815-130.
11. Engaging relevant technical experts and notifying the relevant branches as referred to in paragraph 9 of this Practice Statement as early as possible can assist you in:
 - ensuring that the facts obtained are probative of the elements of the exceptions to the basic rule in section 815-130, and
 - facilitating consideration of the matters so as not to cause delays.

¹ Section 815-15 of the *Income Tax (Transitional Provisions) Act 1997* provides that Subdivisions 815-B, C and D apply to income years starting on or after the earlier of 1 July 2013 and the day the *Tax Laws Amendment (Countering Tax Avoidance and Multinational Profit Shifting) Act 2013* received Royal Assent (being 29 June 2013).

² See paragraphs 2.1, 2.5, 2.16 and 3.2 of the Explanatory Memorandum to the *Tax Laws Amendment (Countering Tax Avoidance and Multinational Profit Shifting) Bill 2013*.

12. Prior to the adoption of any view by the ATO that one of the exceptions should apply in relation to an entity's actual commercial or financial relations, including before communicating any position papers to the taxpayer (or other documents which adopt such views), you must seek approval to do so from a relevant Assistant Commissioner. The relevant Assistant Commissioners are:
- an Assistant Commissioner in the Tax Counsel Network (TCN), Office of the Chief Tax Counsel, in instances where the case has been referred to TCN in accordance with PS LA 2012/1 *Engaging Tax Counsel Network on tax technical issues* and the [Enterprise Risk Management Framework](#) (link available internally only)
 - the Assistant Commissioner within the branch responsible for transfer pricing strategy within PG
 - for cases dealt with in Private Wealth, an Assistant Commissioner in Private Wealth.
13. In support of any request for approval, you must provide to the relevant Assistant Commissioner the draft position paper or other such document setting out the views proposed in relation to, among other things, the application of any of the exceptions. You are not required to prepare documents additional to those normally prepared in transfer pricing cases just to address these matters.
14. This document must contain a clear explanation of the reasons for the application of the exceptions, including how the conditions for the application of the exceptions apply to the entity.
15. This process has been implemented with a view to ensuring that the exceptions to the basic rule in subsection 815-130(1) are applied correctly, consistently and in appropriate instances.

Date issued: 26 February 2015
Date of effect: 26 February 2015
Business line: Public Groups

Amendment history

24 January 2025

Part	Comment
Throughout	Checked for technical accuracy and currency. Updated in line with current ATO style and accessibility requirements. Further amendments made to align with internal restructures and processes.

References

Legislative references	ITAA 1997 Subdiv 815-B ITAA 1997 Subdiv 815-C ITAA 1997 Subdiv 815-D ITAA 1997 815-130 ITAA 1997 815-130(1) ITAA 1997 815-130(2) ITAA 1997 815-130(3) ITAA 1997 815-130(4) ITTPA 1997 815-15 TAA 1953 Sch 1 Subdiv 284-E Tax Laws Amendment (Countering Tax Avoidance and Multinational Profit Shifting) Act 2013
Related public rulings	TR 2014/6
Related practice statements	PS LA 2012/1
Other references	Enterprise Risk Management Framework Explanatory Memorandum to the Tax Laws Amendment (Countering Tax Avoidance and Multinational Profit Shifting) Bill 2013

ATO references

ISSN	2651-9526
File no	1-64SWU3E
ATOlaw topic	International issues ~~ Transfer pricing ~~ Documentation

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