What use is a private ruling?

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Abstract

Australian tax legislation has provided a system of private rulings that are binding on the Commissioner of Taxation since 1992. This system has been modified and expanded over the ensuing years. The purpose of introducing the system of binding rulings was to promote certainty as part of a broader movement in taxation administration towards self-assessment. This article considers whether that goal has been achieved, or ever was achievable as a practical matter, in a variety of administrative and procedural scenarios. The conclusion is reached that a private ruling will have utility for a taxpayer only where a scheme is particularised with sufficient clarity such that it prevents the Commissioner from ruling on a different scheme and is the same scheme that the taxpayer, in fact, implements.

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Overview of the private ruling legislation

Legislative history of private rulings regime

The system of private binding rulings was first introduced in 1992 by the *Taxation Laws Amendment (Self Assessment) Act 1992* (Cth) by inserting Pts IVAAA and IVAA into the *Taxation Administration Act 1953* (Cth) (TAA) that dealt with public binding rulings and private binding rulings respectively. The purpose of introducing the system of binding rulings was to promote certainty as part of a broader movement in taxation administration towards self-assessment. The need of certainty was identified in the second reading speech of the amending Act:[1]

> "The new system of binding and reviewable rulings will promote certainty for taxpayers, and thereby reduce their risks and opportunity costs. The new system will also be fairer because taxpayers will be able to object to private rulings and have the matter reviewed by an independent tribunal or court."

Certainty to taxpayers was recognised by Lockhart J as the primary purpose of the system of private binding rulings in *FCT v McMahon*:[2]

> "The private ruling provisions were introduced to assist taxpayers who are uncertain about the tax effect of an arrangement that is proposed, commenced or completed and who wish to obtain a ruling from the Commissioner on this question before the assessment process is complete. It enables a taxpayer to order their affairs with a degree of certainty about their tax implications before they embark or whilst they are embarking, upon courses of conduct, the tax implications of which may not be known for a considerable time."

It may also be argued that certainty to taxpayers promotes each of the policy objects of simplicity, neutrality and equity in tax design because it fosters less differentiation between taxation of similar activities. In *Tax by Design*, the Institute for Fiscal Studies observed:[3]

> "Lack of simplicity and neutrality invites tax avoidance. Individuals and firms strategically arrange their affairs in response to changes in taxes, so as to reduce their liability even though the underlying economic nature of the activities does not change. But if complexity creates opportunities for avoidance, so avoidance activity invites a complex set of rules to close loopholes. And so the process of avoidance becomes a game of cat and mouse played between the revenue authority and taxpayers. Each revision to the system is followed by the introduction of new

1 The Hon. Peter Baldwin MP, Commonwealth, *Parliamentary debates*, House of Representatives, 26 May 1992, 2775.

2 (1997) 79 FCR 127 at 132.

3 Mirrlees et al, *Tax by Design*, Institute for Fiscal Studies, UK, 2011 at p 42.

> avoidance schemes. Some schemes are demonstrated to be illegal while others are rendered redundant by new revisions to the legislation. The process then begins anew. The perpetual revision of tax law and litigation against avoidance schemes add to complexity and to the cost of implementation. Compliance costs are increased by the search for avoidance schemes and the consequences of litigation. Avoidance activity results in an addition to deadweight loss. A tax system that minimizes avoidance activities—which a simpler and more neutral system will often, though not always, do—will tend to reduce the total economic cost of taxation."

The availability for a taxpayer to obtain from a regulator a ruling that will be binding on that regulator drafted on the basis of consistent principles recognised by that regulator promotes simplicity, neutrality and equity within a tax system because each object is enhanced through the common medium of certainty. The existence of a rulings system reduces the attraction of games of "cat and mouse" by offering the mouse a morsel of the tastiness of the cheese on offer while affording the cat advance notice of the size of the mouse population and its unfolding stratagems.

The private rulings regime migrated in 2005 to Pt 5-5 of Sch 1 to the TAA as part of a package of amendments to the system of binding rulings under the *Tax Laws Amendment (Improvements to Self Assessment) Act 2005 (No 2)* (Cth) (the 2005 Amendments). The amendments included expanding the rulings system to cover questions of the administration and collection of taxes, enacting time limits for the Commissioner to determine an application for a private ruling, and permitting the Commissioner to rely on information provided from third parties.

The legislative scheme

The present private ruling regime is contained in Div 359 of Sch 1 to the TAA. The Act describes a private ruling as "an expression of the Commissioner's opinion of the way in which a relevant provision applies, or would apply, to you in relation to a specified scheme".[4] A "specified scheme" is defined to be an arrangement or any scheme, plan, proposal, course of action or course of conduct, whether unilateral or otherwise.[5]

A person or entity may apply for a private ruling in the approved form.[6] The Commissioner must comply with an application for a private ruling and make the ruling unless the Commissioner declines, on one of several prescribed grounds, to make a private ruling.[7] If the Commissioner makes a private ruling, then the private ruling is binding on the Commissioner if the ruling applies to the taxpayer and the taxpayer relies on the ruling by acting or omitting to act in accordance with the

4 S 359-1, Sch 1 TAA.
5 S 995-1 (definition of "scheme") of the *Income Tax Assessment Act 1997* (Cth) (ITAA97).
6 S 359-10, Sch 1 TAA.
7 S 359-35(1), Sch 1 TAA.

ruling.[8] The Commissioner may apply a taxation law on assessment in a way that is more favourable to the taxpayer than if the provision had been applied in accordance with the ruling.[9]

If the Commissioner considers that further information is required in order to make a private ruling, then the Commissioner must request the applicant give that information.[10] The Commissioner may make assumptions about a future event or another matter if the Commissioner considers that the correctness of a private ruling would depend on an assumption.[11] If the Commissioner decides to make an assumption, the Commissioner must notify the applicant of the proposed assumption and give the applicant a reasonable opportunity to respond.[12]

Despite its apparent binding nature, a private ruling may be superseded in the following ways. First, if the Commissioner issues a later public ruling that is inconsistent with an earlier private ruling, and the scheme has not yet begun to be carried out and the period to which the ruling relates has not yet begun, then the private ruling is taken not to have been made.[13] Second, the Commissioner may also revise a private ruling if the specified scheme has not yet commenced and the period to which the ruling relates has not begun.[14] The Commissioner may make a revised ruling on his own motion, whether or not there has been an application for a revised ruling.[15] Third, if a provision of the taxation legislation is modified or re-written, then the ruling only binds the Commissioner to the extent that the new provision expresses the same ideas as the older provision.[16]

In the discussion that follows, we refer to the flow chart (the "chart") that appears as an Appendix to this article. The chart commences with (1) the application of a taxpayer for a private ruling in relation to a specified scheme, in respect of which there are five possible primary outcomes. These are as follows:

(2) the Commissioner makes a favourable ruling;
(3) the Commissioner makes an unfavourable ruling;
(4) the Commissioner takes too long to make a ruling;
(5) the Commissioner makes an invalid ruling; and
(6) the Commissioner declines to make a ruling.

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8 S 357-60, Sch 1 TAA.
9 S 357-70, Sch 1 TAA.
10 S 357-105(1), Sch 1 TAA.
11 S 357-110(1), Sch 1 TAA.
12 S 357-110(2), Sch 1 TAA.
13 Item 3, s 357-75(1), Sch 1 TAA.
14 S 359-55, Sch 1 TAA.
15 S 359-55(3), Sch 1 TAA.
16 S 357-85, Sch 1 TAA.

Following a consideration of the application itself, we then consider each of these primary outcomes below, together with a number of secondary outcomes. We also consider (7) the potential for the Commissioner to impose penalties on a taxpayer.

1. Application for a ruling in relation to a specified scheme

A ruling will only be useful to a taxpayer if the Commissioner makes a ruling that accurately specifies the relevant scheme. It is thus in the applicant's interest to ensure that he or she has provided the Commissioner with information of sufficient particularity to allow the Commissioner to identify and accurately describe the scheme.

The courts have emphasised repeatedly the importance of providing detailed information to the Commissioner on application for a private ruling. For instance, the Full Court in *Bellinz v FCT*[17] noted that "it is imperative that an applicant give *full details* to the Commissioner either in the initial application or in response to requests by the Commissioner for additional facts".[18]

Similarly, Emmett J in *National Speakers Association of Australia Inc v FCT*[19] noted that it is incumbent on the applicant to provide clear and detailed information to the Commissioner on application for a private ruling:

> "It is an essential part of the scheme of Part IVAA that the arrangement to which the ruling relates must be identified. It is of no use to a tax payer to know that the Commissioner has made a ruling about some arrangement in relation to a particular year of income unless that arrangement and the year of income are identified with precision. *It is, of course, clearly in the interests of a prospective tax payer or applicant to set out with sufficient particularity the arrangement in respect of which a ruling is sought* and the year of income in respect of which the ruling is sought. By the same token, it must then be incumbent upon the Commissioner to identify that which is the subject of the ruling.
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> I consider that the scheme of the legislation contemplates that the applicant must set out, with such particularity as the applicant chooses, details of an arrangement. As I have said, it is in the interests of an applicant to specify an

17 (1998) 84 FCR 154.

18 (1998) 84 FCR 154 at 160C (emphasis added).

19 (1997) 37 ATR 447 at 449-50.

> arrangement which will bear as much resemblance as possible to an arrangement which might actually come into operation." (emphasis added)

As noted by Emmett J in *McMahon*, a taxpayer should be diligent to ensure that scheme is set out with sufficient particularity to obtain a useful private ruling:[20]

> "Clearly, there would be little utility for a Taxpayer in obtaining a ruling as to the way in which the tax law would apply to an arrangement which had not taken place and would not take place in the future. It would be of utility to a Taxpayer to obtain a ruling only if the Taxpayer were diligent to ensure that the arrangement which was the subject of the application reflected either actual facts and circumstances or facts and circumstances which would be likely to occur in the future."

The level of detail and particularity in the description of the scheme will depend on the matter and provisions on which the applicant has sought a private ruling. If the Commissioner considers that the applicant has not provided sufficient information for him to make the private ruling, then the Commissioner *must* request the applicant give him further information.[21] If the applicant does not give the information to the Commissioner within a reasonable time, then the Commissioner may decline to make the ruling.[22] If, on the other hand, the Commissioner makes a private ruling in circumstances where he ought to have requested further information, then the Commissioner will fall into error.[23] For instance, in *CTC Resources NL v FCT*,[24] the Full Court set aside an objection decision to disallow an objection against a private ruling and remitted the matter to the Commissioner for determination of the application according to law on the basis that the Commissioner should not have made a private ruling without first considering whether the ruling could not be made without further information.[25]

In certain instances, however, it may be difficult for an applicant to provide sufficient facts for the Commissioner to make a useful ruling. For example, the Full Court in *Bellinz* questioned the utility of seeking a private ruling in relation to how Pt IVA of the *Income Tax Assessment Act 1936* (Cth) (ITAA36) would apply to an arrangement (at 170C):

> "While there is nothing to suggest that in an appropriate case a ruling could not issue on Pt IVA of the Act, both the Commissioner and the taxpayer must be aware of the difficulty which a private ruling on a Pt IVA issue will create.

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20 (1997) 79 FCR 127 at 149F.
21 S 357-105(1), Sch 1 TAA.
22 S 357-105(2), Sch 1 TAA.
23 *CTC Resources NL v FCT* (1994) 48 FCR 397 at 416E.
24 (1994) 48 FCR 397.
25 (1994) 48 FCR 397 at 416.

> Section 177D(b) sets out the various matters to which the Commissioner shall have regard in reaching the conclusion that a person or more than one person entered into or carried out the scheme or any part of the scheme for the purpose of enabling the relevant taxpayer to obtain a tax benefit in connection with it. One of those matters is 'the manner in which the scheme was entered into or carried out'. Where the arrangement in respect of which a private ruling is sought has not yet been carried out, it is difficult to see how there could be adequate facts upon which to base a private ruling. Even where the scheme has been carried out, there may be in many cases be difficulty in obtaining all the relevant facts, particularly those relating to the manner in which the scheme was entered into or carried out."

Despite the court's misgivings, it is possible to receive a private ruling on a Pt IVA question, and in fact, such rulings have been issued by the Commissioner.[26]

In not all instances will it be possible for the applicant to provide the Commissioner with all the information required to make a ruling, particularly if the ruling is sought in relation to a scheme that has not yet begun to be carried out. If the Commissioner considers that the correctness of a private ruling would depend on assumptions about a future event or other matter, then the Commissioner may make assumptions as the Commissioner considers to be the most appropriate.[27] The Commissioner should not make an assumption as to information which the applicant might be given the opportunity to provide.[28] If the Commissioner is to make an assumption, the Commissioner must notify the applicant about the assumptions that he proposes to make and give the applicant a reasonable opportunity to respond.[29]

In *FCT v Executors of the Estate of Subrahmanyam*,[30] Hill J had misgivings about the utility of seeking a private ruling where the Commissioner is required to make assumptions and inferences on the facts provided in the application. In that case, the executors of an estate had applied for a private ruling as to whether the deceased applicant was a resident of Australia in the years before her death, which required the Commissioner to make an assumption about the state of mind of the deceased. Hill J observed that the reliance on assumptions in a ruling has the potential to undermine the certainty of a private ruling:[31]

> "Where the issue ruled upon, for example, as here, residence, depends upon forming a view as to the state of mind of a person, the Commissioner can no doubt give a ruling which assumes that if he is correct as to the state of mind

26 See, for example, *Pratt Holdings Pty Ltd v FCT* (2012) 216 FCR 258 at 272.
27 S 357-110(1), Sch 1 TAA.
28 *CTC Resources NL v FCT* (1994) 48 FCR 397 at 415E.
29 S 357-110(2), Sch 1 TAA.
30 (2001) 116 FCR 180.
31 (2001) 116 FCR 180 at [49].

> of a taxpayer, then the tax law works itself out in a particular way. But one may wonder at the utility of such a ruling. Assuming that in due course an assessment issues and an objection is determined adversely to the taxpayer following a ruling favourable to the executors (and there is no reason why the Commissioner should not issue an assessment inconsistent with a ruling where the assessment proceeds upon a different state of facts or depends upon a different assumption), the question on a review by the Tribunal or appeal to the Court in respect of an objection decision relating to that assessment will turn upon whether the taxpayer satisfies the burden of showing that the assessment is excessive. The real facts will then fall for decision. The Tribunal or Court may then take a quite different view of the relevant facts from those upon which the Commissioner has ruled or which have been the subject of assumption. *The certainty, which the ruling system was designed to achieve, will have been lost.*" (emphasis added)

2. The Commissioner makes a favourable ruling

2.1 The favourable ruling applies to the taxpayer

In order for the private ruling to be binding on the Commissioner, the ruling must apply to the taxpayer and the taxpayer must rely on the ruling by acting or omitting to act in accordance with the ruling.[32] A private ruling applies to the taxpayer if the taxpayer enters into the specified scheme as identified by the Commissioner in the private ruling. The courts have repeatedly emphasised that a private ruling will only apply to a taxpayer where there is no material difference between the arrangement as set out in the private ruling and the arrangement actually entered into by the taxpayer.[33] In *McMahon*, Emmett J held that (at 150C):

> "[I]f the facts and circumstances as [found on assessment] are materially different from those which are the subject of the ruling, the ruling will be irrelevant."

The question of whether the facts or circumstances are "materially different" has been subject to a number of formulations by the courts. In *Bellinz*, the Full Court held that a ruling will only apply to a taxpayer if the arrangement specified in the ruling is "precisely similar" to the actual arrangement.[34] In *Carey v Field*,[35] Merkel J considered a difference to be material if it would have resulted in a different tax outcome had it been considered by the Commissioner:[36]

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32 S 357-60(1), Sch 1 TAA.
33 *FCT v McMahon* (1997) 79 FCR 127 at 150C.
34 *Bellinz v FCT* (1998) 84 FCR 154 at 169D.
35 (2002) 122 FCR 538.
36 (2002) 122 FCR 538 at [47].

> "In my view if it is reasonably open to the Commissioner to form the view on the material before him that, because of a difference between the arrangement implemented and that ruled upon, the tax outcome for a taxpayer who is a member of the class of persons to whom the ruling was intended to apply is capable of being, or is or likely to be, different to that provided for in the ruling, that difference is a material difference."

Importantly, the "actual" arrangement entered into by the taxpayer is the scheme identified by the Commissioner on assessment. A ruling will only bind the Commissioner if there is no material difference between the scheme specified in the ruling and the scheme as identified on assessment. The issuance of a private binding ruling, however, is a separate process from an assessment of tax liability; the Commissioner is not bound to make the same finding of fact on assessment as he did in the private ruling. This point was explained by Lockhart J in *McMahon*:[37]

> "[O]nce the private ruling is made the Commissioner is bound by it, so is the taxpayer, in the sense that, leaving aside the question of appeal or review, the Commissioner when he issues an assessment must do so on the basis that the 'arrangement' as identified by the Commissioner in his ruling binds both the taxpayer and the Commissioner. It is important to note, however, that when the actual facts as ascertained by the Commissioner form the basis of an assessment by the Commissioner, it is those facts that will govern the assessment, not the facts as identified in the form of an arrangement by the Commissioner in his private ruling, unless the two correspond.
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> The assessment process continues notwithstanding the application for and making of private rulings, subject to the constraint that, if a private ruling has been made, the facts as identified by the Commissioner which constitute the relevant arrangements will govern the assessment that issues in due course. If the facts turn out to be different from those identified by the Commissioner, then the ordinary assessment process applies and in that sense the private ruling becomes academic."

On review of an objection decision, the taxpayer bears the burden of proving that the assessment is excessive.[38] Accordingly, if the Commissioner identifies the scheme differently on assessment, then the taxpayer bears the burden of proof on objection of establishing that there is no material difference between the scheme specified in the favourable ruling and the scheme as determined on assessment. If a taxpayer is successful in arguing that the scheme as implemented should be applied, then the

37 (1997) 79 FCR 127 at 132F-133B.
38 Ss 14ZZK and 14ZZO TAA.

taxpayer will have a ground for demonstrating that the assessment is excessive.[39] A corollary of this point is that the Commissioner will not fall into jurisdictional error in failing to follow a private ruling in an assessment since the question of whether a ruling should apply to a taxpayer is a factual issue that may be determined on a Pt IVC TAA objection.[40]

Where a private ruling is given to a trustee of a trust in relation to the affairs of the trust and the ruling does not relate to indirect taxes or excises, that ruling will also be binding on the Commissioner in respect of any beneficiaries of the trust.[41] Regardless of the type of tax to which the ruling relates, the Commissioner will also be bound in respect of any subsequent persons appointed to the office of trustee.[42]

2.1.1 The specified scheme has begun to be carried out

If a taxpayer has obtained a private ruling that applies to the taxpayer and has begun to carry out the scheme as specified in the ruling, then the taxpayer will be able to bind the Commissioner by relying on the ruling. However, there are a number of ways in which the ruling may cease to apply to the taxpayer, and thus the taxpayer will lose the protection of the ruling. In circumstances where the ruling has already begun to be carried out, this may occur in one of two ways. First, the scheme may change in the future in such a way that it becomes materially different to the scheme specified in the private ruling. Second, the law may change in a way that the provisions applied by the Commissioner in the ruling are no longer in force at the time of assessment. These two situations will be dealt with in turn.

Facts change. As discussed above, one of the primary purposes of the private ruling regime is to provide certainty to taxpayers. This certainty will be lost, however, if a scheme proposed is one that is susceptible to change, since a private ruling can only be relied on if there is no material difference between the scheme ruled on and the actual scheme as determined by the Commissioner during assessment. Consequently, a private ruling may be of limited utility when sought in relation to a dynamic arrangement for future years of income.

This conundrum was illustrated in the case of *Mount Pritchard & District Community Club Ltd v FCT*.[43] In that case, the applicant had obtained a private ruling on 20 February 2004 in which the Commissioner ruled that the applicant was, and would be, exempt from income tax pursuant to item 9.1(c) of s 50-45 of the *Income Tax Assessment Act 1997* (Cth) (ITAA97) in respect of the years of income ended 30 June 2003 to 30 June 2010 inclusive. The Commissioner initially followed the ruling

39 *Mount Pritchard & District Community Club Ltd v FCT* (2011) 196 FCR 549 at [57].
40 *Mount Pritchard & District Community Club Ltd v FCT* (2011) 196 FCR 549 at [58], [61].
41 S 359-30(a), Sch 1 TAA.
42 S 359-30(b), Sch 1 TAA.
43 (2011) 196 FCR 549.

and did not assess the applicant for income tax for the 2003, 2004 and 2005 income years. The Commissioner subsequently determined that there had been a material change to the arrangement that had been ruled on in 2004 as a result of the applicant's amalgamation with another club, and thus the 2004 private ruling was not binding on the Commissioner for the year ending 30 June 2006 and for subsequent years. On this basis, the Commissioner issued notices of assessment for the years of income ended 30 June 2006 and 30 June 2007. The applicant's objection against the 2006 assessment was disallowed. The applicant commenced Pt IVC proceedings in the Administrative Appeals Tribunal (AAT) in relation to the 2006 assessment, which were pending at the time of the Full Court hearing.

The applicant sought declaratory and injunctive relief pursuant to s 39B of the *Judiciary Act 1903* (Cth) on the grounds that the Commissioner fell into jurisdictional error by making the 2006 assessments with knowledge that a private ruling had been made in respect of the applicant. The applicant argued that the Commissioner had deliberately administered the *Income Tax Assessment Act 1936* (Cth) (ITAA36) in breach of the former s 170BB ITAA36 and current s 357-60 of Sch 1 to the TAA.

The Full Court held that where there has been a material change in the activities of an applicant to those that existed at the time that a ruling was issued, then the ruling does not bind the Commissioner for those years of income where the activities are materially different.[44] The court reasoned that this proposition was consistent with the legislative intent of implementing the private rulings regime:[45]

> "[A] private ruling can only bind the Commissioner in respect of the arrangement ruled upon, or where the taxpayer relies upon the ruling by acting in accordance with it. If, in a subsequent period after the private ruling the taxpayer enters into different arrangements, or does not act in accordance with the ruling because of changed circumstances, then the Ruling does not bind the Commissioner. The taxpayer still obtains the protection afforded by the private ruling regime, but only to the extent the taxpayer implements the scheme or arrangements the subject of the ruling. This is not only consistent with the text of the legislation, but also with the Explanatory Memorandum which accompanied the *Tax Laws Amendment (Improvements to Self Assessment) Act (No 2) 2005* (Cth). In the Explanatory Memorandum, it was explained that if the scheme was not implemented in the way set out in a ruling, such ruling would not bind the Commissioner."

As discussed above, if the Commissioner determines that the scheme has changed in a material way, then the taxpayer bears the burden of proof of establishing in Pt IVC proceedings that the scheme has not materially changed.[46] Accordingly, a

44 *Mount Pritchard & District Community Club Ltd v FCT* (2011) 196 FCR 549 at [58]–[59].
45 *Mount Pritchard & District Community Club Ltd v FCT* (2011) 196 FCR 549 at [60].
46 *Mount Pritchard & District Community Club Ltd v FCT* (2011) 196 FCR 549 at [54].

private ruling may have limited utility to a taxpayer for prospective schemes since the taxpayer will lose the protection of the private ruling if the scheme changes in a material way.

Law changes. In a similar vein, a taxpayer who has obtained a private ruling may find the ruling to be of limited utility if the relevant taxation law applied by the Commissioner as applied in the ruling has changed. Section 357-85 of Sch 1 TAA provides that where a Commissioner has made a ruling about a provision that is then subsequently re-enacted or remade, then the ruling is taken to also be a ruling about the new provision but only so far as the new provision expresses the same ideas as the old provision.

The operation and scope of s 357-85 was considered in *Pratt Holdings Pty Ltd v FCT*.[47] Gordon J held that the "idea" underlying a particular provision is to be determined having regard to the provision itself and its proper operation, which is to be determined by reference to any binding contemporaneous authority.[48] In that case, the legislature had amended the provision in question in response to a Federal Court decision that had applied the provision in a different way. Accordingly, Gordon J rejected the taxpayer's submission that the amending Act had merely clarified the operation of the provision, but rather that the amending Act had altered the law substantively in way that the ruling was no longer binding on the Commissioner.[49]

2.1.2 The specified scheme has not yet begun to be carried out

If the taxpayer has not yet begun to carry out the specified scheme, the private ruling may be superseded prior to the period to which the private ruling relates if the Commissioner issues a later inconsistent public ruling,[50] or if the Commissioner makes a revised private ruling.[51]

The Commissioner may revise a private ruling pursuant to s 359-55 of Sch 1 TAA whether or not there is an application for the revised ruling. If the Commissioner revises a ruling, then the ruling in its initial form stops applying to the taxpayer.[52] The Commissioner may not, however, revise a ruling if the scheme specified in the earlier ruling has begun to be carried out *or* if the accounting period to which the ruling relates has already begun.[53] The expression "carry out" refers to "the doing of all things necessary to give effect to a plan of conduct".[54] For example, if the scheme

47 (2012) 216 FCR 258.
48 (2012) 216 FCR 258 at [134].
49 (2012) 216 FCR 258 at [140]–[144].
50 Item 3, s 357-75(1) TAA.
51 S 359-55 TAA.
52 S 359-55(4) TAA.
53 S 359-55(2) TAA.
54 *FCT v Executors of the Estate of Subrahmanyam* (2001) 116 FCR 180 at [42].

specified in a private ruling was a leasing arrangement, then a taxpayer will "carry out" the scheme by giving effect to the leasing arrangement.[55]

It may be arguable that the Commissioner is subject to administrative law requirements to afford a taxpayer procedural fairness prior to revising a ruling. The role of procedural fairness where the Commissioner seeks to revise or withdraw a ruling was considered in *Carey v Field*.[56] That case considered the withdrawal of a product ruling that had been made on application of a partnership of no more than 20 partners and specified that the planting of olive trees would commence before 30 June 2001. On 12 December 2001, the Commissioner withdrew the ruling on the basis that the arrangement as implemented was materially different from that described in the ruling since there were in fact seven partnerships and the trees had not been planted by 30 June 2001. Prior to withdrawing the ruling, the Commissioner's delegate had given an assurance to the partnership that the Commissioner would seek further information from the partnership before withdrawing the ruling, but in fact, no opportunity had been presented.

Merkel J held that the Commissioner's power to withdraw a ruling was a power to defeat the rights of the class of taxpayers to rely on the ruling.[57] Accordingly, the Commissioner was bound by the rules of natural justice,[58] which in the circumstances, required the Commissioner to provide the partnership an opportunity to be heard prior to making a decision to withdraw the ruling.[59] His Honour further held that the taxpayer had a legitimate expectation that the procedure stated by the Commissioner's delegate would be followed, namely, that the partnership would be afforded an opportunity to be heard in respect of all the issues concerning the possible withdrawal of the ruling.[60]

It is unlikely that a court would make a similar finding today. The High Court in *Minister for Immigration and Border Protection v WZARH*[61] held that the notion of a "legitimate expectation" is not a basis for determining whether procedural fairness should be accorded to a person or for determining the content of such procedural fairness.[62] Furthermore, if the Commissioner revises a ruling solely on how a tax law applies to the applicant, then the applicant will have recourse by way of a Pt IVC objection against the revised ruling, rather than by way of judicial review. If, however, the Commissioner revises the ruling on the basis of a material difference

55 *FCT v Executors of the Estate of Subrahmanyam* (2001) 116 FCR 180 at [42], considering *Bellinz v FCT* (1998) 84 FCR 154.

56 (2002) 122 FCR 538.

57 *Carey v Field* (2002) 122 FCR 538 at [56].

58 *Carey v Field* (2002) 122 FCR 538 at [56], citing *Annetts v McCann* (1990) 170 CLR 596 at 598.

59 *Carey v Field* (2002) 122 FCR 538 at [57].

60 *Carey v Field* (2002) 122 FCR 538 at [62].

61 (2015) 256 CLR 326.

62 *Minister for Immigration and Border Protection v WZARH* (2015) 256 CLR 326 at [30].

in fact, as happened in *Carey v Field*, then there may be potential for judicial review of the decision to revise the ruling on the grounds that natural justice has not been observed. This is particularly so because the applicant will not be able to object against the Commissioner's revision of the ruling to the extent that it has redefined the scheme,[63] and thus there may be scope for administrative law remedies to be granted. However, it is rare for the Commissioner to exercise his power under s 359-55 to revise a ruling,[64] and s 359-55 has not yet been litigated in this manner.

A private ruling may also be superseded if the Commissioner later issues a public ruling that is inconsistent with the earlier private ruling.[65] Similar to a revised ruling, the inconsistent public ruling will supersede the earlier private ruling if the scheme specified in the private ruling has not begun to be carried out or the accounting period to which the private ruling relates has not begun.[66] If the scheme has begun to be carried out or the relevant accounting period has begun, then the taxpayer may rely on either ruling.[67] Additionally, if the public ruling was made before an inconsistent private ruling, then a taxpayer may rely on either ruling.[68]

2.2 The favourable ruling does not apply to the taxpayer

A taxpayer may obtain a favourable private ruling, yet may not be able to rely on the ruling if the ruling does not in fact apply to them. Such a situation may arise if the Commissioner does not correctly specify the scheme or if the facts of the implemented scheme change are such that the specified scheme is materially different from the actual scheme that has been or will be carried out. A favourable ruling may also not apply if the Commissioner does not correctly identify the person or entity to whom the ruling relates.

If a taxpayer has obtained a favourable private ruling that does not apply to them, then the applicant can follow one of two courses. First, the applicant could simply enter into the scheme without the protection of the private ruling and take his or her chances on assessment. Second, the taxpayer may make another application for a private ruling to be determined in accordance with the taxpayer's application. If the Commissioner declines to make a second private ruling on the purported basis that he has already made a private ruling,[69] then the applicant may seek mandamus to compel the Commissioner to make a private ruling in accordance with the taxpayer's application.

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63 *FCT v McMahon* (1997) 79 FCR 127.
64 Treasury, "Report on aspects of income tax self assessment" (August 2004) at 20.
65 Item 3, s 357-75(1), Sch 1 TAA.
66 Item 3, s 357-75(1), Sch 1 TAA.
67 Item 3, s 357-75(1), Sch 1 TAA.
68 Item 1, s 357-75(1), Sch 1 TAA.
69 S 359-35(2)(b), Sch 1 TAA.

The case of *Corporate Business Centres International Pty Ltd v FCT*[70] illustrates the availability of mandamus in these circumstances. In that case, the applicant received a purported private ruling in which the Commissioner mis-identified the party who had in fact applied for the private ruling. Hill J held that in such circumstances, no ruling had been made on the taxpayer's application for a private ruling.[71] Accordingly, the taxpayers were entitled to an order by way of mandamus requiring the Commissioner to give a ruling in accordance with the private ruling request.[72]

It may also be possible for a situation to arise whereby a person who is not the rulee would seek to rely on a favourable ruling. For example, in *Pratt Holdings Pty Ltd v FCT*,[73] the taxpayer company, Pratt Holdings, received a loss transfer from another company, LME1, in the income year ended 30 June 1999. The loss included part of a balancing adjustment deduction claimed by LME1 under Subdiv 330-J ITAA97, which the Commissioner had determined to be an allowable deduction in a private ruling to LME1. Pratt Holdings sought to rely on the private ruling. Gordon J noted that the usual course would be for LME1 to have applied to the Federal Court under s 39B of the *Judiciary Act 1903* (Cth) for a declaration that the respondent was bound to permit LME1 to claim the balancing adjustment by virtue of the ruling.[74] This course of action would have been difficult since LME1 was deregistered. During the hearing, the Commissioner conceded that the applicant could rely on the ruling as something that made it entitled to the loss transfer. Accordingly, her Honour held that it was unnecessary for LME1 to seek declaratory relief and that the ruling could be considered as if the applicant was entitled to rely on the ruling.[75]

3. The Commissioner makes an unfavourable ruling

3.1 The unfavourable ruling applies to the taxpayer

If a taxpayer receives an unfavourable ruling, then the taxpayer who is dissatisfied with the ruling may object to the ruling under Pt IVC as if it were a taxation decision.[76] If an objection decision is allowed in whole or in part, then the private ruling will be altered by the successful objection decision once the period for any appeal rights against the objection decision has ended.

70 (2004) 137 FCR 108.
71 *Corporate Business Centres International Pty Ltd v FCT* (2004) 137 FCR 108 at [54].
72 *Corporate Business Centres International Pty Ltd v FCT* (2004) 137 FCR 108 at [54].
73 (2012) 216 FCR 258.
74 *Pratt Holdings v FCT* (2012) 216 FCR 258 at [127].
75 *Pratt Holdings v FCT* (2012) 216 FCR 258 at [128].
76 S 359-60, Sch 1 TAA.

Standing to object

A taxpayer must have standing in order to object to a private ruling decision. Under s 359-60 of Sch 1 TAA, a party may only object to a private ruling if the ruling applies to the party and the party is "dissatisfied" with the ruling.

The meaning of "dissatisfied" was considered by the Full Court in *CTC Resources*. Gummow J determined that a person or entity needed to have more than a mere curiosity in having the formal ruling in order to be "dissatisfied":[77]

> "[T]he dissatisfaction of the person initiating the proceeding is of the following nature. It is a dissatisfaction with the absence of a favourable decision upon the objection which would, if now rectified by the court, place the party in the position for the administration of the taxation laws which should have applied if the ruling had been made by the Commissioner in the terms sought. A mere curiosity or interest in having a formal ruling by the Commissioner for some collateral commercial purpose of the applicant is not sufficient to amount to 'dissatisfaction' in the relevant sense."

On the facts of the case, Gummow J held that since the year of income to which the ruling related had passed and the arrangement had not been entered into, the applicants could not be a person "dissatisfied".

In *Corporate Business Centres International Pty Ltd*, Hill J considered that a mere commercial interest in the outcome of an objection against a ruling would not constitute being "dissatisfied" in the requisite sense:[78]

> "No doubt CBCI may have been dissatisfied in a commercial sense by the ruling. That would not, however, in my view be enough. To be dissatisfied in the present context, it would require the person to be such that a successful objection would place that person in the same position vis-à-vis the operation of the taxation law as that person would have been in."

Scope of review of private ruling

Under s 359-65 of Sch 1 TAA, the Commissioner may consider new information on objection, however the new information cannot redefine the scheme in such a way that it is "materially different" from the scheme to which the ruling relates.[79] Consequently, the Commissioner is only to consider additional information to the extent that it "bears upon the correctness of the ruling in issue".[80] If additional

77 *CTC Resources NL v FCT* (1994) 48 FCR 397 at 408E.

78 *Corporate Business Centres International Pty Ltd v FCT* (2004) 137 FCR 108 at [51].

79 S 359-65, Sch 1 TAA.

80 *Re Cooper Bros Holdings Pty Ltd and FCT* (2013) 59 AAR 165 at [36].

information does redefine the scheme, then the Commissioner must request the applicant to make an application for another private ruling, and the objection is taken not to have been made.[81]

In *McMahon*, Lockhart J held that the tribunal is not permitted to redefine the arrangement identified by the Commissioner on review of a private ruling:[82]

> "In my opinion on a process of review the Tribunal cannot redefine the arrangement. The Tribunal is limited to the facts that constitute the arrangement as identified by the Commissioner in his own ruling. I agree with the submission of counsel for the taxpayer that the arrangement is a 'constant' and a ruling is about how a tax law applies to that arrangement. The question for the Tribunal is whether the Commissioner's opinion as to the application of the law concerning the arrangement is correct. In considering the correctness or otherwise of the objection decision the Tribunal must be limited to the facts as identified by the Commissioner in his ruling as constituting the arrangement.
>
> In making his decision about the private ruling the Commissioner is bound by the facts said by him to constitute the arrangement as identified in the ruling. Nor can the Tribunal travel beyond those facts as identified in the ruling. What the Tribunal does is to 'go over again' the objection decision to consider what it thinks should be the proper answer to the question about the way in which the relevant tax law operated on the identified facts constituting the arrangement."

The limited scope of review of a private ruling was recently considered in *Rosgoe Pty Ltd v FCT*.[83] Rosgoe, as trustee of a discretionary trust, had applied to the Commissioner for a private ruling in relation to the proposed sale of two adjacent parcels of land. The Commissioner issued a private ruling that the proposed sale was not a mere realisation of a capital asset and hence not taxable on capital account under the capital gains tax. In describing the arrangement, the Commissioner did not record whether Rosgoe was carrying on a business. The Commissioner also furnished reasons that did not form part of the private ruling. In these reasons, the Commissioner found that Rosgoe was not carrying on a business of property development.

Rosgoe's objection to the private ruling was disallowed. Rosgoe subsequently sought review of the objection decision in the AAT. The tribunal affirmed the objection decision primarily on the finding of fact that Rosgoe was engaged in carrying on a business during the relevant period.

Logan J held that the tribunal had fallen into error by making a finding of fact that Rosgoe was engaged in business. Since the arrangement described by the

81 S 359-65(3), Sch 1 TAA.

82 *FCT v McMahon* (1997) 79 FCR 127 at 133E.

83 [2015] FCA 1231.

Commissioner did not record that Rosgoe was carrying on a business, then it was not open to the tribunal to make such a finding.[84] In this regard, Logan J emphasised the peculiar nature of a review of a private ruling as distinct from other forms of review of revenue decisions:[85]

> "[12] On a review of an objection decision in respect of a private ruling, the Tribunal is not permitted to redefine the 'arrangement' as stated by the Commissioner in his ruling. Put another way, the Tribunal may not itself engage in a fact finding exercise. Rather, the Tribunal must form its own view as to how a taxation law applies to an arrangement it takes as a given.
>
> ...
>
> [17] The form of review which the Tribunal conducts in relation to a private ruling has a very particular, perhaps even peculiar, quality about it by comparison with the more usual form of merits review undertaken by the Tribunal. Materially and in a revenue law context, when conducting a review on the merits of an objection decision in respect of an assessment, the Tribunal is fully able to reach its own conclusions of fact and law in, for example, deciding that a particular profit on the sale of property is or is not ordinary income. In doing so, the Tribunal is in no way bound by whatever conclusions of fact which the Commissioner may have reached on that subject. Indeed, were a Tribunal member to regard himself or herself as so bound, that would amount to a jurisdictional error. So the very ethos of independence engendered by observation of that more usual jurisdictional requirement can lend a counter-intuitive quality to the review of a private ruling decision."

Limitations on objection rights

A person or entity that is dissatisfied with a ruling may not object against a private ruling if there is an assessment for the person or entity for the income year or other accounting period to which the ruling relates.[86] In such circumstances, where the assessment does not reflect the outcome that would have prevailed had a favourable private ruling been granted, the appropriate course of action is for the taxpayer to object to the assessment under Div 3 of Pt IVC.[87] Should the unsuccessful applicant for the private ruling have been a trustee of a trust estate to whom no assessment was issued by the Commissioner, then the beneficiaries who are taxable on the net income of the trust estate should object to their own assessments.

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84 *Rosgoe Pty Ltd v FCT* [2015] FCA 1231 at [16].

85 *Rosgoe Pty Ltd v FCT* [2015] FCA 1231 at [12] and [17].

86 S 359-60(1), Sch 1 TAA.

87 In such circumstances, s 14ZVA TAA will not prevent the objection because there will have been no valid objection against the private ruling.

Objection rights on a subsequent assessment

Section 14ZVA TAA provides the following:

> **"14ZVA Limited objection rights because of other objections**
>
> If there has been a taxation objection against:
>
> (a) a private ruling; or
> ...
>
> the right of objection under this Part against an assessment, or against a decision made under an indirect tax law or an excise law, relating to the matter ruled or determined is limited to a right to object on grounds that neither were, nor could have been, grounds for the taxation objection against the ruling or determination."

As noted by Logan J in *Rosgoe*, where the taxpayer has already objected against a private ruling, s 14ZVA precludes an objection on a ground that was or could have been a ground for an objection against a ruling.[88] Since a taxpayer may not object to a private ruling on the ground that the Commissioner got the facts or assumptions wrong, it is possible to object to a subsequent assessment on the basis that the assessment is excessive when one has regard to the true facts. If there is a material fact missing in the scheme as specified by the Commissioner in the private ruling, then a dispute of a subsequent assessment would be a dispute about a tax liability under a different scheme. In such circumstances, s 14ZVA is not engaged.[89]

3.2 The unfavourable ruling does not apply to the taxpayer

A private ruling is only binding to the extent that the scheme as identified by the Commissioner on assessment is not materially different to the scheme as specified in the private ruling. Consequently, if the scheme specified by the Commissioner is materially different to the actual scheme entered into or proposed by the applicant, then the ruling is ultimately irrelevant.

In these circumstances, a taxpayer may opt to not seek review of the private ruling and carry out the scheme regardless. On assessment, if the facts are determined to be materially different to those specified in the ruling, then the unfavourable ruling will not bear on the assessment. Emmett J in *McMahon* observed the irrelevance of a private ruling that does not apply to a taxpayer:[90]

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88 *Rosgoe Pty Ltd v FCT* [2015] FCA 1231 at [32].
89 *Rosgoe Pty Ltd v FCT* [2015] FCA 1231 at [32].
90 *FCT v McMahon* (1997) 79 FCR 127 at 150B.

> "A Taxpayer, when faced with an assessment, may conclude that the facts and circumstances which give rise to the assessment are materially different from the arrangement which was the subject of a ruling. In such a case, there would be nothing to preclude the Taxpayer from objecting to that assessment. Upon disallowance of the objection, the Taxpayer will have the same rights as always, either to seek review by the Tribunal or to appeal to the Court.
>
> On the hearing of such a review or appeal, the Taxpayer and the Commissioner will each be entitled to adduce evidence with a view to a finding being made as to the facts and circumstances relevant to the assessment. The assessment will then be based on those facts and circumstances. If the ruling was based on facts and circumstances relevantly identical to those as so found, the ruling will be binding. On the other hand, if the facts and circumstances as so found are materially different from those which are the subject of the ruling, the ruling will be irrelevant."

Alternatively, the taxpayer may apply for a new ruling to be determined according to the actual facts. It must be noted, however, that the Commissioner may decline to make a private ruling if the matter sought to be ruled on has already been considered by the Commissioner.[91] Furthermore, a party may not seek review in the tribunal or the court of the way in which the Commissioner specifies the scheme in the private ruling since the scheme may not be redefined on review.[92] As a result, if the Commissioner misstates the scheme or the issues to be determined in a private ruling and persists with the misstatement, then a taxpayer may be left with limited recourse against the Commissioner.

Such a situation arose in *Investa Properties Ltd and FCT*.[93] In that case, the tribunal considered a private ruling issued by the Commissioner that had only ruled on one aspect of a broader arrangement that had been clearly indicated by the taxpayer. Senior Member Hunt noted that while the Commissioner's persistence in dealing with the wrong question had stymied the taxpayer's efforts to obtain a private ruling, the tribunal nevertheless was unable to review the Commissioner's ruling in a meaningful way as the tribunal's powers did not extend to reframing the issue identified in the ruling.[94] Consequently, the taxpayer's application for review was dismissed "in the hope that the Commissioner will reconsider the actual scheme identified and issue a new ruling on the subject matter of the scheme about which the taxpayer sought a private ruling".[95]

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91 S 359-35(2)(b) TAA.
92 *Rosgoe Pty Ltd v FCT* [2015] FCA 1231 at [12].
93 [2009] AATA 121.
94 *Investa Properties Ltd and FCT* [2009] AATA 121 at [21].
95 *Investa Properties Ltd and FCT* [2009] AATA 121 at [23].

When all hope is lost and the Commissioner declines to rule on the actual scheme as requested by the applicant, it may be open to the applicant to seek mandamus to compel the Commissioner to make a private ruling in accordance with the applicant's request.[96]

4. The Commissioner takes too long to make a ruling

Under the current private rulings regime, the Commissioner is subject to strict time limits in making a ruling. If the Commissioner fails to make a ruling or declines to make a ruling within 60 days after an application has been made, an applicant may give the Commissioner written notice requiring him to make the ruling.[97] If, within 30 days of being given notice, the Commissioner has failed to determine the ruling, then the applicant may object under Pt IVC. The applicant must lodge with the objection a draft private ruling.[98] In deciding an objection against a failure to make a private ruling, the Commissioner must either make a private ruling in the same terms as the draft ruling lodged with the objection, or make a different private ruling.[99] If the Commissioner has not made an objection decision within 60 days of the day on which the objection was lodged, then the Commissioner will be taken to have disallowed the objection.[100]

If the Commissioner delays in making a private ruling, an applicant may be vulnerable if the applicant requires the ruling to be made promptly, particularly in relation to proposed commercial schemes. For example, the applicants in *Bellinz* had instituted proceedings by way of mandamus in order to obtain the original favourable draft ruling in a time that the partners commercially needed the ruling to issue.[101] The mandamus application was discontinued after the Commissioner agreed to issue the private ruling on a fixed date.

An applicant may also be vulnerable to change in the relevant taxation law if the Commissioner delays in determining a ruling. This situation arose in *IOOF Holdings Ltd v FCT*.[102] In that case, IOOF had applied for a private ruling on 30 December 2010, asking whether the contractual rights of members in a tax consolidated group were deductible in accordance with s 716-405 ITAA97. The Commissioner received the application for a private ruling on 10 January 2011. After the Commissioner had failed to make a ruling, IOOF on 19 August 2011 gave the Commissioner written notice under s 359-50(1) of Sch 1 TAA requiring him to make a private ruling. The

96 *Corporate Business Centres International Pty Ltd v FCT* (2004) 137 FCR 108 at [54].
97 S 359-50(1), Sch 1 TAA.
98 S 359-50(4), Sch 1 TAA.
99 S 14ZY(1A) TAA.
100 S 14ZYB TAA.
101 *Bellinz Pty Ltd v FCT* (1998) 84 FCR 154 at 157B.
102 (2014) 224 FCR 535.

Commissioner failed to make a ruling, and on 20 October 2011, IOOF objected under s 359-50(3) of Sch 1 TAA to the Commissioner's failure to make a private ruling. The Commissioner did not provide a private ruling within 60 days of receipt of the objection, and thus on 19 December 2011, IOOF's objection was deemed to be disallowed under s 14ZYB TAA. On 15 February 2012, IOOF applied to the AAT for review of the deemed disallowance of its objection to the Commissioner's failure to make a private ruling.

In 2012, the Commonwealth government made changes to income tax law affecting consolidated groups, particularly in relation to the way in which a consolidated group could deduct the costs allocated to some assets following a corporate acquisition. The changes were enacted under the *Tax Laws Amendment (2012 Measures No. 2) Act 2012* (Cth), which received royal assent on 29 June 2012, prior to IOOF's hearing before the AAT. The legislation was to have retrospective effect, but was not to affect a private ruling issued before 31 March 2011.

IOOF contended that it had an accrued right to have its private ruling application determined according to the law prior to the 2012 Act. In dismissing the appeal, Robertson J held that IOOF had an accrued procedural right to have its application for a private ruling determined by the Commissioner. IOOF did not, however, have a substantive right to have its application determined according to the law as it applied prior to the amendments. This was for the reason that:[103]

> "a private ruling is only binding up to a change in the law and, apart from a statutory provision providing otherwise, a ruling and therefore an application for a ruling or any accrued rights thereunder does not survive a change in the law."

5. The Commissioner makes an invalid ruling

Under s 357-90 of Sch 1 TAA, the validity of a ruling is not affected merely because a provision of Pt 5-5 relating to the form of the ruling or the procedure in making it has not been complied with.[104] In *Corporate Business Centres International*, however, Hill J held that the s 357-90 did not operate to turn something that is not a ruling at all into a ruling.[105] In particular, if the ruling does not specify the scheme to which the ruling applies or the person to whom the ruling applies, then it cannot be said that a ruling has been made in the first place.[106]

103 *IOOF Holdings Ltd v FCT* (2014) 224 FCR 535 at [125].

104 S 357-90, Sch 1 TAA.

105 *Corporate Business Centres International Pty Ltd v FCT* (2004) 137 FCR 108 at [48].

106 *Corporate Business Centres International Pty Ltd v FCT* (2004) 137 FCR 108 at [48]–[49].

If a ruling is invalid, then an applicant may not object to the ruling, since there is no ruling against which an applicant may object. In *National Speakers*, the taxpayer had applied for a private ruling as to whether it was exempt from income tax. The private ruling application did not specify the years of income or the arrangement to which the ruling related, but rather sought a "general ruling" as to the "status of the association". The Commissioner issued a private ruling that identified the years of income as the year ended 31 December 1996, but did not identify the arrangement to which the ruling related. Emmett J held that the Commissioner's failure to identify the arrangement meant that the notice of ruling was invalid, and thus no private ruling had been made.[107] Consequently, the process of objection and appeal to the court had miscarried.[108]

6. The Commissioner declines to make a ruling

The Commissioner may decline to make a ruling. The grounds on which the Commissioner may decline to make a private ruling are the following:

- the Commissioner considers that making the ruling would prejudice or unduly restrict the administration of a taxation law;[109]
- the matter sought to be ruled on is already being, or has been, considered by the Commissioner;[110]
- the matter sought to be ruled on is how the Commissioner would exercise a power under a relevant provision and the Commissioner has decided or decides whether or not to exercise the power;[111]
- the Commissioner has requested additional information from the applicant in order to make the ruling and the applicant has not provided the information within a reasonable time;[112] or
- the Commissioner considers that an assumption is required to make a correct private ruling, and the Commissioner is unwilling to make such an assumption.[113]

Regarding the interrelationship of the final two bullet points, in *FCT v Hacon Pty Ltd*,[114] the Full Bench of the Federal Court held that the legislative policy evident in the provisions is to leave the Commissioner a discretion about whether to make a private ruling where assumptions are needed to be made but otherwise to compel the Commissioner to obtain information where its provision will require

107 *National Speakers Association of Australia Inc v FCT* [1997] FCA 1371; (1997) 37 ATR 447 at 450.
108 *National Speakers Association of Australia Inc v FCT* [1997] FCA 1371; (1997) 37 ATR 447 at 450.
109 S 359-35(2)(a), Sch 1 TAA.
110 S 359-35(2)(b), Sch 1 TAA.
111 S 359-35(3), Sch 1 TAA.
112 S 357-105, Sch 1 TAA.
113 S 357-110(1), Sch 1 TAA.
114 *FCT v Hacon Pty Ltd* [2017] FCAFC 181.

the Commissioner to make a ruling even though the ruling will be adverse to the applicant.[115] The court proceeded to say that the "information" referred to in the provision must be "information the absence of which prevents the ruling being made or, in other words, is information which, if given, will enable the ruling to be made".[116] Further, the court said:[117]

> "An applicant should not be deprived of a ruling (with the benefit of its terms or an entitlement to object and appeal under Part IVC) by the Commissioner classifying some particular (to use a neutral word) as an assumption if the absence of that particular prevents the ruling being made and the giving of the information upon the Commissioner's mandatory request will enable the ruling to be made."

The explanatory memorandum to the 2005 Amendments sets out examples of where the Commissioner may be entitled to decline to make a ruling on the basis that the making of the ruling would prejudice or unduly restrict the administration of a tax law (at [3.83]):

> "Examples where making a ruling would prejudice or unduly restrict the administration of a tax law include where:
>
> - the application is frivolous or vexatious or not seriously contemplated;
> - complying with the request for the private ruling would not have any practical consequences for the taxpayer, for example, because it relates to a transaction that occurred some years ago and the taxpayer's amendment period has already expired; or
> - making the private ruling would unreasonably divert resources from other matters to which the Commissioner must attend in the course of administering the taxation laws."

If the Commissioner declines to make a ruling, then the applicant is not able to object against the ruling under Pt IVC. The applicant may, however, seek judicial review of the decision to decline to make a ruling. The availability of judicial review remedies in this context was explicitly adverted to in the explanatory memorandum to the 2005 Amendments (at [3.79]):

> "The question of whether making the ruling would prejudice or unduly restrict the Commissioner's administration is a matter for the Commissioner. While the Commissioner is not expected to decline to rule lightly, a decision to decline is not reviewable under the tax law. However, it may be reviewable under the *Administrative Decisions (Judicial Review) Act 1977*."

115 *FCT v Hacon Pty Ltd* [2017] FCAFC 181 at [8].
116 *FCT v Hacon Pty Ltd* [2017] FCAFC 181 at [14].
117 *FCT v Hacon Pty Ltd* [2017] FCAFC 181 at [14].

For example, in *Corporate Business International*, the applicant was entitled to mandamus where the Commissioner had incorrectly identified the person to whom the ruling related.[118]

However, the availability of judicial review remedies in the private rulings context may be limited. If, for example, the Commissioner declines to rule on the basis that the applicant failed to provide additional information to the Commissioner, then it is unlikely that the applicant will be able to make out the grounds for judicial review.

7. Penalties

Prior to the 2005 Amendments, the failure to follow a private ruling provided a ground for assessing a penalty against a taxpayer. This ground was removed by the 2005 Amendments on the basis that the penalty "had the potential to operate as an inappropriate disincentive to entities seeking Australian Taxation Office (ATO) advice".[119] Nevertheless, a taxpayer may still be liable to penalties from a failure to take reasonable care, and from taking a position about a large income tax item that is not reasonably arguable.

A failure to apply for a private ruling will not necessarily amount to a failure to take reasonable care.[120] In particular, the failure to obtain a private ruling will not amount to a failure to take reasonable care where the taxpayer had sought expert tax advice on the tax provisions in dispute.[121] In certain circumstances, however, the failure to apply for a private ruling may be a factor taken into account as to whether a penalty should be imposed. In *Re AJJJ's Emporium Pty Ltd and FCT*,[122] the tribunal dismissed an application for review of an administrative penalty imposed by the taxpayer's reckless conduct with respect to a purported claim for input tax credits. Member Hughes rejected the applicant's claim of disadvantage on relying on general and theoretical telephone advice from the Commissioner, and that the applicant should have obtained a private ruling, or at least informed professional advice, given the sizeable amount of the applicant's claim.[123]

118 *Corporate Business International Pty Ltd v FCT* (2004) 137 FCR 108 at [54].

119 Para 3.6 of the explanatory memorandum to Tax Laws Amendment (Improvements to Self Assessment) Bill (No. 1) 2005 (Cth).

120 *North Ryde RSL Community Club Ltd v FCT* (2002) 121 FCR 1 at [84].

121 *MLC Ltd v FCT* (2002) 126 FCR 37 at [53].

122 (2013) 93 ATR 484.

123 *Re AJJJ's Emporium Pty Ltd and FCT* (2013) 93 ATR 484 at [25].

8. Some examples

There are certain factual scenarios where the application for a private ruling will have significant use to a taxpayer in adopting a correct position in his or her tax return. One such scenario is where the occurrence of the relevant facts was unavoidable and there was no option available to a taxpayer to elect to choose among a number of alternative courses of action, but nonetheless identification of the correct tax treatment is uncertain. For example, for a taxpayer who receives a compensation payout from an insurance company as the result of a workplace accident, there will usually be a question as to whether elements of the compensation represent revenue in the taxpayer's hands as a substitute for lost earnings or are an affair of capital, representing compensation for the loss of a productive asset. The Commissioner has issued many thousands of such private rulings over the last ten-year period providing his view on which of the treatments is correct in the particular case at hand. Once the ruling is issued, the taxpayer can then prepare his or her return accordingly and receive certainty of treatment. The alternative approaches, which will involve a greater level of unpredictability, is for the taxpayer:

- to prepare his or her return on a favourable basis in the anticipation that the Commissioner will not disagree on audit, with the potential for penalties to be involved; or
- to prepare his or her return on an unfavourable basis and then to lodge an objection to the assessment once it has issued.

At the other extreme, there are examples where a ruling will be of lesser use. Typically, these arise where a question is posed of the Commissioner that cannot be answered without him making excessive assumptions about future facts. The problem is exacerbated where certain of those assumptions are conditioned on the correctness of earlier assumptions. By way of illustration, where the matter on which the Commissioner is requested to rule relates to an objective purpose to be imputed to a taxpayer (such as under anti-avoidance rules) in respect of his or her future conduct in implementing a scheme and any ruling is based on assumptions to be selected by the Commissioner, there is a significant chance that the actual future facts will deviate from those facts assumed by the Commissioner to be true. In such circumstances, it is likely that any ruling, whether favourable or unfavourable, will not apply to the taxpayer (refer 2.2 and 3.2 above). In the recent *Hacon* decision[124] referred to above, the Full Federal Court endorsed the approach of the Commissioner to decline to make a private ruling in circumstances where a "particular" (to use a neutral word) constituted an "assumption" rather than a mere piece of "information" which the taxpayer could provide.

124 *FCT v Hacon Pty Ltd* [2017] FCAFC 181 at [14].

9. Current developments

In 2017, following public consultations, the Commissioner announced that the ATO was reshaping its private advice services, which will include streamlining private ruling applications.[125] Changes have been made to the private ruling application form which now allow a taxpayer's technical adviser the option of lodging a copy of a draft ruling in accepted style and format that may then be considered by the ATO.

10. Conclusion

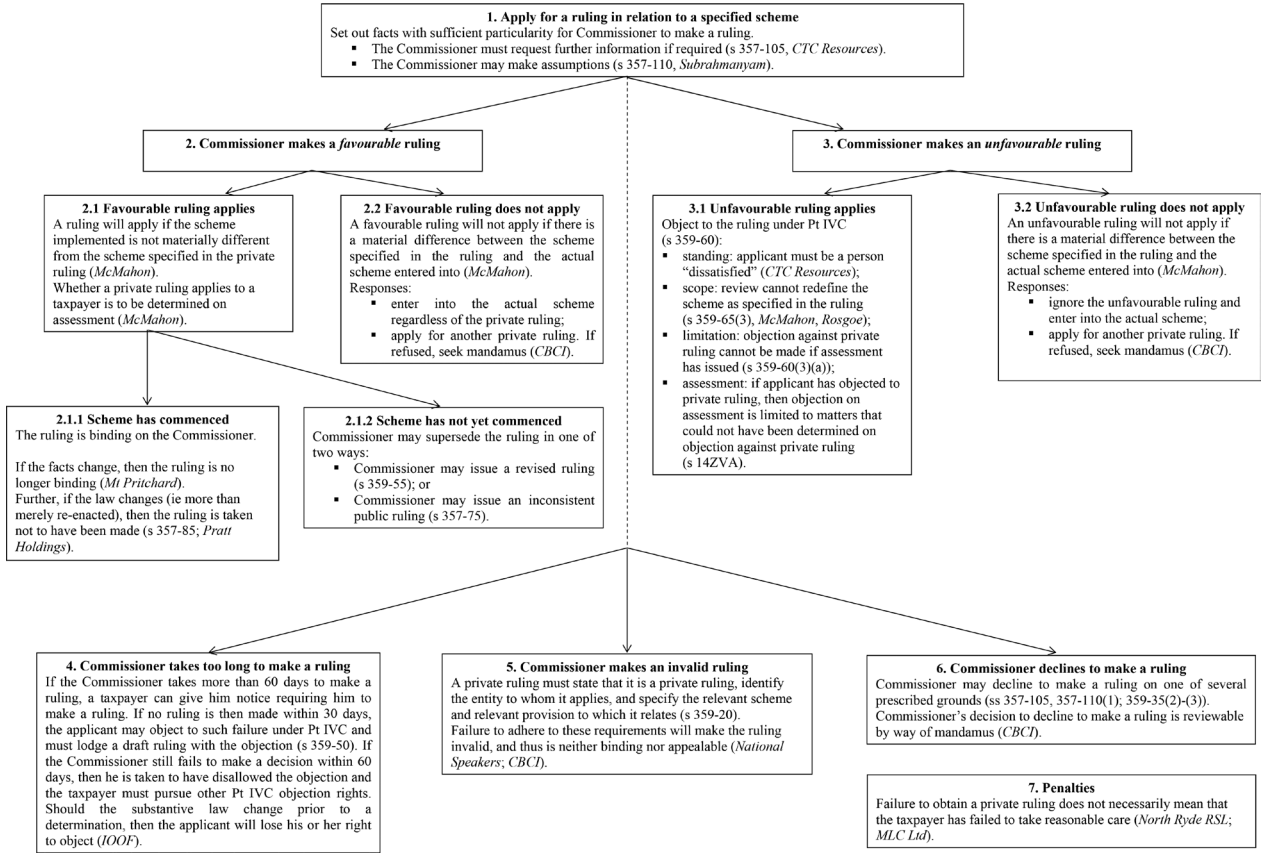
A private ruling will have utility for a taxpayer only where it is binding on the Commissioner. For a ruling to be binding on the Commissioner, it is necessary that both:

- the scheme particularised by the taxpayer in its application is not materially different to the scheme which the taxpayer actually implements as a factual matter; *and*
- the scheme described by the Commissioner in his ruling decision is not materially different to the scheme which the taxpayer actually implements.

The key to receiving a useful private ruling, therefore, is to define the scheme for the Commissioner with sufficient clarity that it prevents the Commissioner ruling on a *different* scheme. While one might strive for some flexibility in the facts, there cannot be so much latitude that there are in truth a myriad of schemes. Ultimately, whether or not the taxpayer achieves the certainty that is sought rests in the Commissioner's hands as the one identifying the scheme. Accordingly, not all arrangements will be susceptible to a useful ruling. As indicated above, where facts are clear because they are known or have occurred, circumstances may be appropriate for a private ruling; however, where excessive assumptions are to be made about future facts by the Commissioner and liability to tax depends on conclusions as to purpose to be imputed to a taxpayer from those facts, the utility of the private ruling process may be compromised.

125 ATO, "Reshaping private advice". Available at www.ato.gov.au/general/ato-advice-and-guidance/reshaping-private-advice/.

Appendix


1. Apply for a ruling in relation to a specified scheme
Set out facts with sufficient particularity for Commissioner to make a ruling.
The Commissioner must request further information if required (s 357-105, CTC Resources).
The Commissioner may make assumptions (s 357-110, Subrahmanyam).
2. Commissioner makes a favourable ruling
3. Commissioner makes an unfavourable ruling
2.1 Favourable ruling applies
A ruling will apply if the scheme implemented is not materially different from the scheme specified in the private ruling (McMahon).
Whether a private ruling applies to a taxpayer is to be determined on assessment (McMahon).
2.2 Favourable ruling does not apply
A favourable ruling will not apply if there is a material difference between the scheme specified in the ruling and the actual scheme entered into (McMahon).
Responses:
enter into the actual scheme regardless of the private ruling;
apply for another private ruling. If refused, seek mandamus (CBCI).
3.1 Unfavourable ruling applies
Object to the ruling under Pt IVC (s 359-60):
standing: applicant must be a person "dissatisfied" (CTC Resources);
scope: review cannot redefine the scheme as specified in the ruling (s 359-65(3), McMahon, Rosgoe);
limitation: objection against private ruling cannot be made if assessment has issued (s 359-60(3)(a));
assessment: if applicant has objected to private ruling, then objection on assessment is limited to matters that could not have been determined on objection against private ruling (s 14ZVA).
3.2 Unfavourable ruling does not apply
An unfavourable ruling will not apply if there is a material difference between the scheme specified in the ruling and the actual scheme entered into (McMahon).
Responses:
ignore the unfavourable ruling and enter into the actual scheme;
apply for another private ruling. If refused, seek mandamus (CBCI).
2.1.1 Scheme has commenced
The ruling is binding on the Commissioner.
If the facts change, then the ruling is no longer binding (Mt Pritchard).
Further, if the law changes (ie more than merely re-enacted), then the ruling is taken not to have been made (s 357-85; Pratt Holdings).
2.1.2 Scheme has not yet commenced
Commissioner may supersede the ruling in one of two ways:
Commissioner may issue a revised ruling (s 359-55); or
Commissioner may issue an inconsistent public ruling (s 357-75).
4. Commissioner takes too long to make a ruling
If the Commissioner takes more than 60 days to make a ruling, a taxpayer can give him notice requiring him to make a ruling. If no ruling is then made within 30 days, the applicant may object to such failure under Pt IVC and must lodge a draft ruling with the objection (s 359-50). If the Commissioner still fails to make a decision within 60 days, then he is taken to have disallowed the objection and the taxpayer must pursue other Pt IVC objection rights. Should the substantive law change prior to a determination, then the applicant will lose his or her right to object (IOOF).
5. Commissioner makes an invalid ruling
A private ruling must state that it is a private ruling, identify the entity to whom it applies, and specify the relevant scheme and relevant provision to which it relates (s 359-20).
Failure to adhere to these requirements will make the ruling invalid, and thus is neither binding nor appealable (National Speakers; CBCI).
6. Commissioner declines to make a ruling
Commissioner may decline to make a ruling on one of several prescribed grounds (ss 357-105, 357-110(1); 359-35(2)-(3)).
Commissioner's decision to decline to make a ruling is reviewable by way of mandamus (CBCI).
7. Penalties
Failure to obtain a private ruling does not necessarily mean that the taxpayer has failed to take reasonable care (North Ryde RSL; MLC Ltd).