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Joint Standing Committee on Public Accounts and Audit
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Dear Madam/Sir,

Supplementary (second) submission to the
"Inquiry reviewing a range of taxation issues within Australia"

My first submission concerned my inability, in my capacity as a trustee of a Self Managed Super Fund (SMSF). to obtain a private binding ruling from the ATO. Their written reason was that "private rulings are only available on income tax matters involving extent of liability." Over the phone I was told that the ATO cannot give private rulings on superannuation matters because they are matters governed by the SIS Act.

I am not a lawyer, but the purpose of this submission is to share some research I have undertaken which suggests to this layman that the ATO may already have the necessary authority to issue binding rulings to SMSFs.

The ATO has been responsible for the general administration of the laws governing small superannuation funds (both SISA and the Tax Act) ever since it took over that role from APRA.

TAA Part1 Section 2(1) contains the following definition

> ``**taxation law''** means-
>
> **(a)** this Act;
>
> **(b)** any other Act of which the Commissioner has the general administration (other than an Act prescribed for the purposes of this paragraph);

Because the ATO was specifically given the responsibility for the general administration of the tax affairs of small superannuation funds including Self Managed Superannuation Funds (SMSFs) it follows from the above definition that one would expect the ATO could make taxation law rulings in this area. The ATO has already issued a number of Interpretive Decisions on superannuation matters, covering such areas as reversionary pensions, etc., and there appears to be nothing in the Act which prohibits their issuing rulings, either private or public.

The ATO kindly sent me the following email which cited extracts from TAA Section 14ZAAA to support their view that a private ruling could not be given.

> **Tax law – policy** Officers must ensure that requests for private rulings under Part IVAA of the *Taxation Administration Act 1953* (TAA) are in respect of a tax law as defined.
>
> They must also ensure that the provision of the tax law under review is relevant to working out the extent of liability under the law.
>
> **What is a 'tax law'** Part IVAA private rulings can only be given in respect of tax laws.
> 'Tax law' is defined in section 14ZAAA of the TAA to mean:
>
> - an income tax law
> - a fringe benefits tax law, or
> - a product grant or benefit law.
>
> An income tax law is a law under which is worked out the extent of liability for income tax, including income tax arising from the operation of the capital gains tax provisions, withholding tax, mining withholding tax, Medicare levy or franking deficit tax.
>
> A fringe benefits tax law is a law under which is worked out the extent of liability for FBT.
> A product grant or benefit law is a law under which the extent of entitlement to a grant or benefit mentioned in section 8 of the *Product Grants and Benefits Administration Act 2000* (PGBAA) is worked out.
>
> A law is a section or other provision of an Act and includes a regulation made under an Act.
> These sections are given effect in Part IVAA of the TAA by subsection 14ZAA(2) which states:
> 'Expressions used in this part have the same meanings as in Part IVAAA.'
>
> **Provisions affecting the extent of liability** For income and fringe benefits tax purposes, a provision or regulation will affect the extent of a person's liability if it impacts on the amount of tax payable by the person – ie if it is relevant to calculating a

person's assessable income, allowable deductions or tax offsets. (**Note:** The Product Grants and Benefits definition is specific to section 8 of the PGBAA and is not included in this discussion.)

'Tax law' means a law which directly includes an amount in assessable income, or allows a deduction or tax offset

The pension arrangement in question was approved by the trustee in June 2003. If the trustee does proceed with the pension as approved, and the arrangement is subsequently struck down by the ATO, a considerable tax liability could fall on the trustees as well as on the member concerned. The otherwise tax-exempt segregated Fund could become liable for income and capital gains taxes, and income tax offsets could be denied to the member who could instead become liable for personal tax at the top rate. **These consequences would appear to make this a tax matter which does involve the "extent of liability**", to use the words in the ATO letter.

A request for a private ruling also appears to lie within the ATO definition as listed under their publication "What is a private ruling?" The main ATO document cited governing private rulings (TR 93/1 of 7 Jan 93) indicates that it is generally the trustee of a superannuation fund who would request a ruling (if the beneficiary agrees, as is the case here). The same document also lists all the grounds for "Applications that do not have to be dealt with." None of the ten listed grounds for not giving a ruling appear to apply in this case.

When the legislation was introduced in May 2004 banning defined benefit pensions from SMSFs it was recorded that such cases would need to be decided on a case-by-case basis. No mechanism or timeframe was postulated for such decisions, but I cannot believe that the intention was for trustees to first fumble alone in this complex legal morass, then make a decision, and then if they get it wrong they potentially lose almost half the pension assets.

Conclusion

It seems to me that the ATO is splitting hairs when they deny rulings to trustees of SMSFs. Although the Commissioner continues to publicly encourage taxpayers to obtain advice before investing in superannuation, the ATO itself has refused to give any helpful advice on which a trustee can rely, even though the ATO does not face the same consequences as trustees if they get something wrong.

A quote from Submission 5 to your Committee is closely related to the present situation: "*self-assessing has relieved the Tax Office of the obligation to examine returns but increased the obligation on the taxpayer to correctly apply the ever more complex income tax legislation".* It appears to be a manifestation of the ATO exerting power without responsibility.

Surely one should be able to obtain a definite answer from some branch of government in such a matter, but if not from the ATO then from where? Small super funds are no longer APRA's responsibility, and although APRA appears to provide clear and useful advice to its large fund clients, SMSF matters are outside the APRA remit. (On APRA's website Frequently Asked Questions No 14 concerns *Defined Benefit requirements*, where reference is

made to APRA's case-by-case approach and APRA's willingness to provide guidance, in situations having some similarities to the one I as trustee now face).

Only a private binding ruling from the ATO would appear to have the capacity to provide some essential clarity to the trustee in this difficult and complex area.

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