

AUSTRALIAN TAX ADVISORY FIRM GOVERNANCE

Best practice principles

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Foreword

The best practice principles (the “Principles”) have been developed by Deloitte Australia, EY Australia, KPMG Australia and PwC Australia, in connection with provision of tax advice, to complement compliance with the legal, professional and regulatory regime applying to them and comply with the current and future requirements relating to government procurement. The Principles should also build further confidence and trust amongst wider stakeholders, including clients, the wider community, regulators, governments and other agencies. Other firms may also choose to adopt these Principles, in a manner which is appropriate to the size and circumstances of each such firm.

Each of the firms who have adopted the Principles have separately assessed the Principles and determined that it is appropriate for that firm to support and adopt them.

The Australian Taxation Office (ATO), Tax Practitioners Board (TPB), professional associations, taxpayers and tax advisors have separate roles and responsibilities with respect to the effective operation of the tax system. Whilst taxpayers are responsible for their own tax affairs, tax advisors play an important role in advising them in this regard.

The Principles provide an objective basis against which firms can test their governance of higher risk tax advisory services. It is voluntary for firms to apply the Principles.

All firms who adopt these Principles do so as competitors and as such acknowledge that these Principles do not in any way seek to restrict the provision of tax services or in any way lessen competition.

Background

Tax advisors perform an important role in making a positive contribution to the effective operation of the tax system. Our self-assessment tax system together with the complex and frequently uncertain nature of our tax laws, necessitate taxpayers seeking advice in respect of their tax affairs. Indeed, the provision of high-quality advice underpins the self-assessment regime and builds confidence in the tax system.

Tax advisors have a legal obligation to act in the best interests of their clients and act within the law, including taking reasonable care in advising their clients and ensuring that their advice is at least reasonably arguable based on the law as it stands at the time.

There are also multiple legal, professional and regulatory regimes that set the standards for tax advisors and provide strong external oversight together with appropriate penalties and sanctions. These include:

- Tax Agents Services Act 2009 (Cth) (TASA), administered by the TPB, which ensures that tax agent services are provided to the public in accordance with appropriate standards of professional and ethical conduct with significant sanctions for non-compliance;
- Taxation Administration Act 1953 (Cth) (TAA), administered by the ATO, which contains provisions aimed at deterring the promotion of tax avoidance and evasion schemes, with severe penalties and outcomes for any breach, as well as other provisions such as those which impose various administrative penalties for making false or misleading statements or taking a position that is not reasonably arguable;
- Accounting Professional and Ethical Standards (APES) which, amongst other things, set the standards for the provision of quality and ethical “Taxation Services” and is mandatory for members of CPA Australia, Chartered Accountants ANZ and Institute of Public Accountants; and
- Legal Profession Uniform Law Australian Solicitors’ Conduct Rules 2015 which contains measures relating to legal practitioners providing tax advice.

Scope

The Principles apply to services provided in respect of Australian federal taxation laws by the firms who have adopted the Principles (and by any other affiliated entities owned or controlled by such firms).

These Principles do not override professional duties of the Advisors to their clients nor should they give rise to any conflict under general law, the Tax Agent Services Act or professional regulation, and in the event of any conflict, such general law or professional regulation shall prevail. For these purposes a conflict shall be considered to arise at least where such law or professional regulation would prevent compliance with what would otherwise be required by these Principles.

Tax Services System of Quality Management

Firms providing tax advisory services should have a documented tax services system of quality management which underpins the firm's ability to meet the following:

- acting with integrity;
- providing advice to their clients which meets or exceeds the reasonably arguable standard;
- taking reasonable care in obtaining the relevant facts and considering wider risk when providing advice;
- working honestly and openly with the Commissioner;
- having appropriate quality control processes in place which are subject to oversight and review;
- meeting relevant legal and regulatory obligations; and
- not engaging in activities which would constitute a breach of the promoter penalty provisions.

The leadership of the firm (CEO, Board, Senior partner or the like) is ultimately responsible for the tax services system of quality management. Where a firm is part of a broader firm construct (such as a network of member firms across a number of jurisdictions) and it uses common global policies and risk management frameworks, it must ensure that the latter are appropriately supplemented to address the relevant Australian legal and regulatory requirements.

The tax services system of quality management should include policies and processes in relation to the Principles as set out below:

Tax advisory principles

Principle 1 – Proscribed engagements

- 1 The firm has procedures aimed at preventing it from knowingly or recklessly advising on arrangements when providing advice on Australian federal taxation laws which involve:
 - a the creation of documents, accounting entries or disclosures that are intended to misrepresent the true arrangement or transaction;
 - b a lack of disclosure to the ATO for their effectiveness;
 - c tax evasion, fraud or other criminal tax-related conduct; and
 - d promotion of tax exploitation schemes.

Principle 2 – Governance of higher risk engagements

Principle 2.1 – Higher risk engagements

- 1 The firm has established triggers and protocols, which are appropriate having regard to the firm's size and circumstances, to identify and deal with higher risk engagements in providing services in relation to Australian federal taxation laws. The triggers include:
 - a transaction size;
 - b positions that may have systemic risks to government revenue;
 - c transactions exhibiting fact patterns identified in a Taxpayer Alert or other arrangements which the ATO has identified as an area of focus or risk;
 - d contingent and other non-traditional fee arrangements;
 - e advice contrary to ATO published positions;
 - f where a client wishes to take a position that the firm considers not to be reasonably arguable; and
 - g transactions and arrangements which carry other features indicating a higher than normal level of risk.

Principle 2.2 – Engagement acceptance

- 1 The firm issues letters of engagement to clients in relation to services concerning Australian federal taxation laws that have satisfied its client acceptance procedures, articulating:
 - a all relevant deliverables within the scope of the engagement and any materially relevant areas not covered in the engagement;
 - b that the onus is on the client to provide full and frank instructions and full and true disclosure of all relevant facts, including where appropriate the commercial rationale, on which advice is being sought;
 - c the key personnel and their role and responsibility in the engagement team;
 - d terms and conditions, including fee arrangements and basis of calculation; and
 - e limitations on reliance on the advice.

- 2 The scope of engagement is ultimately a matter for the client to determine, however, best professional endeavours should be employed to recommend a scope of engagement that adequately addresses relevant issues and risks.
- 3 The firm should not require that an engagement for the provision of tax advice be established as a legal services engagement. However, provision of tax advice where it is a legal service and would be provided by appropriately qualified personnel may be established as a legal services engagement at the client's request – i.e. it is for a client to decide whether they seek to obtain legal advice from lawyers in relation to any particular matter.

Principle 2.3 – Critical tax sensitive facts and circumstances

- 1 Tax advice should be based on a comprehensive view of relevant facts, and where appropriate, relevant and reasonable assumptions. This does not include verifying or auditing the accuracy of the client's statement but may involve making further enquiries of the client.
- 2 In taking reasonable care to obtain the relevant facts, reliance should not be placed upon information provided by the client if the engagement partner knows or ought to reasonably know that the information is not credible. In this case, the engagement partner should make further enquiries or take such further action as they consider appropriate.
- 3 Where, despite best professional endeavours as set out in Principle 2.2.2, the scope of the advice is narrowed, this should clearly be set out in the advice.

Principle 2.4 – Supporting advice and legal opinions

- 1 Reliance shall not be placed upon supporting advice or legal opinion, if the engagement partner knows or ought reasonably to know that advice is not credible.

Principle 2.5 – Reasonably arguable positions

- 1 In the course of advising a taxpayer, it is to be expected that various positions may be considered or discussed, some of which may not be reasonably arguable, prior to providing the advice. However, recommended positions or advice provided should be at least reasonably arguable, based on the law as it stands at the time and the known facts. In this regard, there should be an assessment at the commencement of an engagement and as the engagement proceeds.
- 2 In some instances, the client may have previously taken, or may intend to take, positions which in the engagement partner's view may not be reasonably arguable. In these instances, the engagement partner should outline how he or she assesses such positions and advise the client about the risk assessment of the matter, ATO engagement options, disclosure obligations and penalty considerations. Depending on the scope of the engagement, the engagement partner may also comment on alternative positions and arrangements that are not reasonably arguable. The engagement partner may also assist the taxpayer in rectifying their affairs in such a situation.
- 3 Positions adopted by a taxpayer with respect to their tax affairs are ultimately a matter for the taxpayer. Notwithstanding the engagement partner's recommendation or advice, a taxpayer may decide to proceed in a manner that is not reasonably arguable in the engagement partner's opinion. In that case, the engagement partner should consider their various legal and professional obligations.
- 4 There will be situations where the application of the law to a matter is not clear and where reasonable minds will differ. If the ATO has a different view on a matter, that does not of itself mean that the position of a taxpayer or an advisor is not reasonably arguable.

Principle 2.6 – Documenting the advice provided to the client

- 1 A written note is made of all final advice provided to the client including (as materially relevant) facts, assumptions, reasoning or analysis undertaken to reach the conclusion.

Principle 2.7 – Independent review process

- 1 Higher risk engagements should be reviewed by another partner or internal review panel. In addition, there may be specialist involvement, engagement with the ATO or advice may be sought from Counsel.
- 2 Procedures are in place for escalation of relevant issues to the firm's tax leadership or other internal advisory panels and governance bodies.

Principle 3 – Consequences for failing to adhere to the Principles

Principle 3.1 – Failure to adhere to the Principles

- 1 Partners who fail to adhere to the Principles are subject to the firm's disciplinary processes and may be referred to the relevant professional body where necessary.

Principle 3.2 – Partner competence

- 1 Any concerns over a partner's technical competency is addressed through capability improvement plans.

Principle 4 – Quality management and process review

Principle 4.1 – Design effectiveness review

- 1 The Firm has a tax services system of quality management in place that is designed to enable compliance with the Principles.
- 2 The design effectiveness of the firm's relevant tax services system of quality management is independently reviewed at least every three years. Such reviews may be by an external party or an internally qualified party acting independently.

Principle 4.2 – Operational effectiveness review process

- 1 The firm has a monitoring process designed to provide it with reasonable confidence that the policies and procedures relating to the tax services system of quality management are relevant, adequate, and operating effectively.
- 2 Higher risk engagements are subject to the processes set out in Principle 2.7.
- 3 A sample of higher risk engagements are periodically subject to a further review.

Principle 4.3 – Annual confirmation

- 1 Based on the output from the review and monitoring processes in place (described in Principles 4.1.2 and 4.2.1), the firm publishes an annual statement that it has reasonable confidence that the policy and procedures, which facilitate compliance with the Principles, are operating effectively.