

QUESTION WE'VE BEEN ASKED QB 14/07

TAX ADMINISTRATION ACT 1994 – PROSCRIBED QUESTIONS

All legislative references are to the Tax Administration Act 1994 unless otherwise stated.

This Question We've Been Asked applies in respect of ss 91E(4)(a) and 91F(4)(a).

Question

1. We have been asked whether the Commissioner may include a statement relating to a "proscribed question" in a private or product ruling.

Answer

2. Yes. Including a statement relating to a "proscribed question" (such as a reference to a person's intention) in the description of the Arrangement, or as an assumption or a condition, in a private or product ruling will not breach s 91E(4)(a) or s 91F(4)(a).

Explanation

3. Section 91E(4)(a) provides that the Commissioner may not make a private ruling if:
 - (a) the application for the ruling would require the Commissioner to determine a proscribed question ...
4. Section 91F(4)(a) contains an equivalent provision in relation to product rulings.
5. The term "proscribed question" is defined in s 3:

proscribed question means—

 - (a) whether a fact is correct or exists:
 - (b) what is a person's purpose or intention, for the purpose of any provision of the Income Tax Act 2007 that expressly refers to a person's purpose or intention:
 - (c) what is the value of a thing:
 - (d) what is commercially acceptable practice, for the purposes of any provision of that Act that expressly refers to commercially acceptable practice
6. We have been asked whether including a statement in a description of the Arrangement, or as an assumption or a condition, in a ruling could be "determining" a proscribed question for the purposes of s 91E(4)(a).

Assumptions and conditions

7. The situation in respect of assumptions and conditions about proscribed questions in a ruling is clear.
8. Sections 91EF(3) and 91FF(3) provide that the Commissioner may make assumptions about the answer to a proscribed question, and making those assumptions is not treated as determining the proscribed question for the purposes of s 91E(4)(a).
9. Similarly, ss 91EH(1B) and 91FH(1B) provide that the Commissioner may stipulate conditions about the answer to a proscribed question, and stipulating those

conditions is treated as not determining the proscribed question for the purposes of s 91E(4)(a).

10. The legislation is clear that the Commissioner may include an assumption or a condition in a private or product ruling that relates to a proscribed question, such as the value of a thing or a person's intention. If the Commissioner includes an assumption or a condition in a ruling relating to a proscribed question, the applicant may be able to seek a Factual Review of the condition or assumption (for more information on Factual Reviews, go to www.ird.govt.nz (keyword: factual review)).

Description of the Arrangement

11. There is no equivalent provision in respect of the answer to a proscribed question being included in the description of the Arrangement in a ruling. This omission can be interpreted in two ways. On the one hand, it could suggest that a similar outcome was intended in respect of the description of the Arrangement, but that Parliament thought clarification was necessary only in respect of conditions and assumptions. On the other hand, it could suggest that Parliament did not intend that the Commissioner include the answer to a proscribed question in the description of the Arrangement and that Parliament deliberately or implicitly contrasted those positions in the legislation.
12. With this in mind, to answer the question we must consider the meaning of the term "determine". The *Concise Oxford English Dictionary* (12th edition, 2011, Oxford University Press) contains the following definitions of the term "determine":

Determine v. **1** cause to occur in a particular way; be the decisive factor in. **2** firmly decide: *she determined to tackle Stephen the next day.* **3** ascertain or establish by research or calculation. **4** Mathematics specify the value, position, or form of (a mathematical or geometrical object) uniquely. **5** Law, archaic bring or come to an end

13. The term "determine", therefore, has a variety of meanings, but the most relevant ones relate to something being decided or ascertained.
14. This is consistent with the second definition of "determine" in *Osborn's Concise Law Dictionary* (10th edition, 2009, Thomson, Sweet and Maxwell, edited by Mick Woodley), which states:

Determine. (1) To come to an end; (2) To decide an issue or appeal.

15. Several cases have considered the meaning of the term "determine".
16. In some of those cases, such as *Town v Stevens* (1899) 17 NZLR 828, the courts have found that the term "determined" means "ended". This is meaning five from the *Concise Oxford English Dictionary* (quoted above). However, this interpretation cannot be relevant in the present situation, because the Commissioner will not be "ending" a proscribed question. Such an interpretation would be nonsensical in this context.
17. The Supreme Court of Victoria in *City of Heidelberg v McPherson* [1964] VicRp 102, [1964] VR 783 considered whether a resolution that the council of the City of Heidelberg is "of the opinion that the following works are necessary", meant that the council had "determined" that the works were necessary. O'Bryan J stated, at 785:

Now it is quite clear that in this particular matter the council is not called upon to determine any matter inter partes, it is not making a decision between two people as to who is in the right or who is in the wrong or who has rights or powers against the other: **it is doing no more than making up its mind whether certain works are necessary;** it is acting, in other words, in a governmental or executive capacity. I would have thought that when a

council says, by resolution through its councillors, that "it is of opinion that so and so", it means quite clearly that **it has made up its mind, or decided, or determined, whichever word you like to use**, that these works are necessary. I do not think that this fine distinction which is made by Mr. McHugh gives a correct meaning to the words in this section. **The word "determines" in this context means no more than decides or forms the opinion.** [Emphasis added]

18. The English Court of Appeal reached a similar conclusion in *Muir v Inland Revenue Commissioners* [1966] 3 All ER 38, where Win J stated, at 48:

Whilst the matter is not really relevant if the view which I have already expressed be correct, I nevertheless desire to say that I am of the firm opinion that the word "determination" there used cannot be given the meaning, which I understood to be suggested by the submission, of "assessment". **In my opinion the context in which the word is used, and, indeed, used several times in the section, with or without the corresponding verb "determine", is far too strong to permit of its being understood as meaning anything but a decision on a point of law declared by the commissioners.**

...

It is plain that there the words "determined" and "determination" are equivalent to: decided and decision, and are quite incapable of being understood to mean an assessment or the amount stated in an assessment.... [Emphasis added]

19. More recently, the English Court of Appeal (Criminal Division) in *Young v R* [2004] 2 All ER 63 considered whether a confiscation order had been "determined" within six months, as required by the relevant legislative provision. May LJ, delivering the decision of the court, stated, at [56]:

We consider on reflection that **the "words "determining" and "determination" connote the end of the process, that which the court eventually decides.** A substantive start to a hearing within the six month period which is adjourned beyond that period does not achieve a determination within the six month period. [Emphasis added]

20. Based on the above cases, and consistent with the dictionary definitions, the Commissioner considers that the word "determine" in s 91E(4)(a) must mean "decide". This interpretation seems appropriate in the context of the rulings regime, because a ruling gives the Commissioner's decision on the application of tax laws to an Arrangement. The purpose of s 91E(4)(a) seems to be to prevent the Commissioner from being required to decide whether certain factual matters are correct.
21. Simply including a statement in the description of the Arrangement of a matter that has been advised to the Commissioner as part of an application for a binding ruling does not involve a decision being made on whether the statement is correct. Therefore, simply including a statement relating to a proscribed question (such as a reference to a person's intention) in the description of the Arrangement cannot breach s 91E(4)(a).
22. In this regard, ss 91EJ and 91FK specifically contemplate the Commissioner relying on facts provided by the applicant for a ruling. Subsection (1) of those sections provides that the information supplied to the Commissioner is the factual basis on which the Commissioner makes a private or product ruling. Subsection (2)(a) of those sections provides that the Commissioner may inquire into the correctness of those facts before a ruling is made, but is not required to do so. Similarly, under ss 91EB(2)(a) and 91FB(2)(a), if the arrangement entered into differs materially from the arrangement described in the ruling (based on the facts provided by the applicant), the ruling does not apply.

References

Subject references

Proscribed questions

Legislative references

Tax Administration Act 1994, ss 3 (definition of "proscribed question"), 91E(4)(a), 91EF(3), 91EH(1B), 91EJ, 91F(4)(a), 91FF(3), 91FH(1B), 91FK.

Case references

City of Heidelberg v McPherson [1964] VicRp 102; [1964] VR 783

Muir v Inland Revenue Commissioners [1966] 3 All ER 38,

Town v Stevens (1899) 17 NZLR 828

Young v R [2004] 2 All ER 63

Other references

Concise Oxford English Dictionary (12th edition, 2011, Oxford University Press)

Osborn's Concise Law Dictionary (10th edition, 2009, Thomson, Sweet and Maxwell, edited by Mick Woodley)