

## QUESTION WE'VE BEEN ASKED

QB 18/07

When is an arrangement considered to be “materially different” from the arrangement identified in a private or product ruling?

*This question we've been asked (QWBA) will be of interest to anyone who has been issued a binding private or product ruling where differences exist between the arrangement described in the ruling and the arrangement implemented.*

*This QWBA explains when the Commissioner will consider an arrangement to be materially different from the arrangement identified in a private or product ruling.*

### Key provisions

Sections 91EB(2)(a) and 91FB(2)(a) of the Tax Administration Act 1994.

### Key terms in this item

This QWBA relates to **private rulings** and **product rulings**.

A **private ruling** provides certainty to the person(s) referred to in the ruling about how the Commissioner will apply relevant taxation laws to the person(s) in relation to an arrangement.

A **product ruling** provides certainty to consumers of a particular product about how the Commissioner will apply relevant taxation laws to them in relation to the arrangement to which they are a party.

An **arrangement** is a contract, agreement, plan or understanding (whether enforceable or not), including all steps and transactions by which it is carried into effect. It includes facts that the Commissioner considers are material or relevant as background or context to a private or a product ruling.

## Question

**When is an arrangement (the revised arrangement) considered to be “materially different” from the arrangement identified in a private or product ruling for the purpose of ss 91EB(2)(a) and 91FB(2)(a) of the Tax Administration Act 1994 (TAA)?**

## Answer

**The revised arrangement is “materially different” for the purpose of ss 91EB(2)(a) and 91FB(2)(a) of the TAA if, in relation to a tax type, the difference between the revised arrangement and the arrangement identified in the ruling is capable of affecting the tax outcome referred to in the ruling.**

**Whether the revised arrangement is materially different from the arrangement identified in the ruling will be considered on a case-by-case basis, because it will turn on the facts and circumstances of each case.**

## Explanation

1. Section 91EB(2) of the TAA sets out the instances in which a private ruling does not apply to a person in relation to a tax type for an arrangement. One such instance is if the arrangement is “materially different” from the arrangement identified in the ruling. Section 91EB(2)(a) states:

- (2) A private ruling does not apply to a person in relation to a tax type for an arrangement, to the extent to which, in relation to the tax type —
- (a) the arrangement is **materially different** from the arrangement identified in the ruling;... [Emphasis added]

...

2. Section 91FB(2)(a) of the TAA contains an equivalent provision in relation to product rulings.
3. We have been asked to provide guidance on the meaning of “materially different” in ss 91EB(2)(a) and 91FB(2)(a).

4. To provide this guidance, **we must consider the meaning of the terms “materially” and “different”**. The *Oxford English Dictionary* (online ed, Oxford University Press, accessed 13 February 2017) relevantly defines these two terms (and their derivatives) as follows:

**Materially adv.** ... **4** To a material or important extent; significantly, substantially, considerably.

...

**Material adj.** (specifically in the context of “having significance or relevance”) ... **6a** Of serious or substantial import; significant, important, of consequence. ... **6c** Of evidence or a fact: significant or influential, esp. in having affected a person’s decision-making; ... **6d** Pertinent, relevant; essential.

**Different adj.** ... **2a** Unlike in nature, form, or quality; not of the same kind; dissimilar.

**Differ v. 1** To have different or distinguishing qualities or features; to be dissimilar, different, or distinct in nature, form, or qualities in a particular respect.

5. Therefore, based on these definitions, **a “materially different” arrangement is one that is significantly unlike the arrangement identified in the ruling, with that difference being of consequence or influential in affecting a person’s decision-making.**
6. No New Zealand case law has considered the meaning of “materially different” in a tax context.
7. The Australian Federal Court considered the meaning of the phrase in *Carey v Field* [2002] FCA 1173. **The case was an application for judicial review of the Australian Commissioner’s decision to withdraw a product ruling (a type of public ruling) in the context of the original Australian binding rulings regime (since repealed and replaced).** The court was required to consider whether, on the material before the Commissioner and upon which he relied, it was open to him to conclude that the differences he identified as “material differences” were considerations that he was entitled to take into account in deciding to withdraw the product ruling. **The real issue between the parties related to what constitutes a “material difference” in that context. The relevant legislation contained no reference to the phrase “materially different”**. However, the product ruling contained the following statement:

If the arrangement described in the Product Ruling is **materially different** from the arrangement that is actually carried out, investors lose the protection of the Product Ruling. [Emphasis added]

8. The applicant submitted that for a difference to be material, the difference **must** result in a different tax outcome to that provided for in the ruling. Merkel J disagreed and expressed the following views 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, and therefore not an irrelevant consideration in the context of the judicial review of a decision to withdraw the ruling under s14ZAAK(1) of the [Taxation Administration Act 1953 (Cth)]. While a purpose of the binding public ruling system is to provide certainty to taxpayers, that purpose is better served by the Commissioner having the power to withdraw a ruling if he forms the view that the differences between the arrangement

implemented and that ruled upon are capable of having or likely to have a different tax outcome to that provided for in the ruling. Plainly, if it is reasonably open to the Commissioner to form the view that the tax outcomes ruled upon do not apply, greater certainty is provided by the withdrawal of the ruling. The object of certainty and the public interest are not served by the maintenance of a ruling where the Commissioner has formed a view, that is reasonably open on the basis of the material before him, that the ruling can no longer be safely relied upon because of differences between the arrangement implemented and that ruled upon.

9. In other areas of law, the courts have held that a difference is “material” if it is significant or relevant (*Rainey v Greater Glasgow Health Board* [1987] 1 All ER 65 and *Minister for Immigration, Local Government and Ethnic Affairs v Dela Cruz* (1992) 110 ALR 367). In the context of contracts in writing and written instruments, a material alteration is one that alters the legal effect of the instrument (*Vacuum Oil Co Pty Ltd v Longmuir* [1957] VR 456). Given the very different context in which these cases were decided, it is the Commissioner’s view that they are of very limited interpretative value.
10. In the context of the New Zealand binding rulings legislation, it is the Commissioner’s view that the phrase “materially different” in ss 91EB(2)(a) and 91FB(2)(a) means a difference that is **capable** of affecting the tax outcome referred to in the ruling.
11. Therefore, if in relation to a tax type, the difference between the revised arrangement and the arrangement identified in the ruling is capable of affecting the tax outcome referred to in the ruling, the Commissioner’s view is that the revised arrangement is “materially different” from the arrangement identified in the ruling for the purpose of ss 91EB(2)(a) and 91FB(2)(a).
12. Whether a revised arrangement is materially different from the arrangement identified in a private or product ruling depends on the facts and circumstances of each case. The size of the difference in tax outcome is not a determining factor when evaluating whether the difference in the arrangement is material for the purpose of ss 91EB(2)(a) and 91FB(2)(a). In certain instances the size of the difference in tax outcome will not be a relevant factor at all. Given the widely divergent nature of the taxation laws in respect of which binding rulings may be made, it is not possible to list all the factors that the Commissioner will take into account when considering each case. The Commissioner will consider each matter on a case-by-case basis.

### When the ruling ceases to apply under ss 91EB(2)(a) and 91FB(2)(a) of the TAA

13. It is the Commissioner’s view that, if a revised arrangement is materially different from the arrangement identified in a ruling, the ruling does not apply in relation to the tax type for the arrangement from the point in time that the arrangement is materially different. The ruling will continue to apply from commencement of the period of the ruling until that point.

### Process

14. If you have a question about whether an arrangement is materially different from the arrangement identified in a private or product ruling you should contact:
  - your Compliance Manager if you are a Significant Enterprise taxpayer; or
  - the team that worked on your ruling; or
  - the Taxpayer Rulings Unit of the Office of the Chief Tax Counsel ([rulings@ird.govt.nz](mailto:rulings@ird.govt.nz)).

You may be required to apply for a new ruling to enable the Commissioner to consider whether the revised arrangement is materially different from the arrangement ruled on.

## Examples

The following examples help to explain the application of the law.

### **Example 1: Using a different investment vehicle**

Shane, Karen and Steve intend to use a limited partnership structure to invest in a commercial property development. They obtain a private ruling about the tax treatment of interest paid and tax losses. However, they end up using a look-through company structure instead of a limited partnership structure for their investment.

The Commissioner considers the revised arrangement is materially different from the arrangement identified in the ruling, because the investment vehicle used is capable of affecting the tax outcome identified in the ruling.

### **Example 2: Loan financing provided by a different bank on identical terms**

No 8 Wire Limited is in negotiations with ABC Bank (a New Zealand bank) to obtain a loan for \$5 million to acquire new business equipment for its factory in New Plymouth. No 8 Wire Limited obtains a private ruling to confirm that interest payments under the proposed loan contract with ABC Bank will be deductible for income tax purposes. The loan falls through shortly after the private ruling is issued, but No 8 Wire Limited is able to secure a \$5 million loan on identical terms from XYZ Bank (also a New Zealand bank).

The Commissioner considers that the arrangement is not materially different from the arrangement identified in the private ruling issued to No 8 Wire Limited because the difference in the arrangement is not capable of affecting the tax outcome identified in the private ruling.

### **Example 3: Acquiring shares in a different company listed on the ASX**

Marama is a share dealer with a significant share portfolio. She intends to acquire a portfolio interest in Technotrooper, a foreign company listed on the ASX. She obtains a private ruling that dividend income derived from this company is not income, so is not taxable. The ruling is on the basis that this investment is an attributing interest in a foreign investment fund (FIF) in relation to which the fair dividend rate method will be used to calculate Marama's FIF income, and none of the exemptions in ss EX 31 to EX 43 will apply to her proposed shareholding in Technotrooper.

Shortly after obtaining the private ruling, Marama decides to acquire a portfolio interest in GadgetsGalore instead. GadgetsGalore is also listed on the ASX.

The Commissioner considers that the arrangement is materially different from the arrangement identified in the private ruling, because the tax outcome is capable of being different to that provided for in the private ruling that Marama obtained. Shares listed on the ASX may be eligible for the exemption in s EX 31.

**If Marama's rights in GadgetsGalore meet the requirements in s EX 31 it will be exempt from being an attributing interest in a FIF, and no FIF income will arise. However, if Marama's rights in GadgetsGalore do not meet the requirements in s EX 31 it will not be exempt from being an attributing interest in a FIF, and FIF income may arise in Marama's hands if all the other relevant requirements in s CQ 5 are met.**

### **Example 4: Difference affects only one of the sections ruled on**

Bric-a-Brac Limited obtains a private ruling in respect of how ss CA 1, CB 1, CB 2, CB 3, CB 4, CB 5 and CX 55 of the Income Tax Act 2007 apply to an arrangement. The arrangement subsequently implemented is different from the arrangement identified in the ruling. The difference is capable of affecting how s CX 55 applies to the arrangement but is not capable of affecting how any of ss CA 1, CB 1, CB 2, CB 3, CB 4, or CB 5 apply to the arrangement.

Section 91EB(2)(a) of the TAA provides that a "private ruling does not apply to a person in relation to a tax type for an arrangement, to the extent to which, in relation to the tax type, the arrangement is materially different from the arrangement identified in the ruling".

While the private ruling contains ruling bullet points in relation to multiple sections relating to

income tax, the private ruling is in relation to only one tax type (that is, income tax). As the difference between the arrangement identified in the ruling and the arrangement implemented is capable of affecting the tax outcomes ruled on, the ruling does not apply in relation to the relevant tax type (being income tax) for the arrangement. As the ruling was in relation to only one tax type (being income tax), the entire ruling does not apply.

**Example 5: Difference affects tax outcome not ruled on**

Bubble and Squeak Limited obtains a private ruling in relation to how ss CW 10 and CX 55 of the Income Tax Act 2007 apply to an arrangement. The arrangement as implemented differs from the arrangement ruled on. However, the differences are not capable of affecting the tax outcomes ruled on – the differences are capable of affecting only the tax outcome in relation to s IC 5 (which was not ruled on).

**It is the Commissioner's view that the arrangement is not "materially different" for the purpose of s 91EB(2)(a) of the TAA in these particular circumstances.** This is because the differences between the arrangement ruled on and the arrangement implemented are not capable of affecting the tax outcomes **ruled on**.

**Example 6: Difference affects only one of the tax types ruled on**

Pitter Patter Limited obtains a private ruling that contains ruling bullet points in relation to income tax and ruling bullet points in relation to GST. The difference in the arrangement ruled on and the arrangement implemented is capable of affecting the GST outcome ruled on, but is not capable of affecting the income tax outcome ruled on.

Under s 91EB(2)(a) of the TAA a **"private ruling does not apply to a person in relation to a tax type** for an arrangement, to the extent to which, **in relation to the tax type** the arrangement is materially different from the arrangement identified in the ruling".

**Therefore, it is the Commissioner's view that the private ruling does not** apply to Pitter Patter Limited in relation to GST for the arrangement. This is because, in relation to the GST tax type, the difference between the arrangement identified in the ruling and the arrangement implemented is capable of affecting the manner in which the GST legislation ruled on applies to the arrangement. The private ruling continues to apply to Pitter Patter Limited and the arrangement in relation to the income tax legislation ruled on.

**Example 7: Difference may affect conclusion under s BG 1 of the Income Tax Act 2007**

Property Projects Limited applies for and obtains a private ruling in relation to a new business venture that it is about to launch. The description of the arrangement contains a statement to the effect that Property Projects Limited uses, and will continue to use, IFRS. In the absence of that statement the Commissioner would not be able to rule as requested in relation to s BG 1 of the Income Tax Act 2007.

Shortly after the private ruling is issued the IFRS thresholds are modified. Those falling under/outside the new thresholds are now able to choose whether to use IFRS or GAAP. Property Projects Limited chooses to continue using IFRS.

As Property Projects Limited continues to use IFRS following the modification of the IFRS thresholds, the statement of fact contained in the description of the arrangement holds true. **Therefore, it is the Commissioner's view that the arrangement remains the same as that identified in the ruling.**

If Property Projects Limited starts using GAAP instead of IFRS following the modification of **the IFRS thresholds, it is the Commissioner's view that the revised arrangement is materially different** from the arrangement identified in the private ruling as it is capable of affecting the tax outcome referred to in the ruling.

## References

### Subject references

materially different

### Legislative references

Tax Administration Act 1994 – ss 91EB(2)(a) and 91FB(2)(a)

### Case references

*Carey v Field* [2002] FCA 1173  
*Minister for Immigration, Local Government and Ethnic Affairs v Dela Cruz* (1992) 110 ALR 367  
*Rainey v Greater Glasgow Health Board* [1987] 1 All ER 65  
*Vacuum Oil Co Pty Ltd v Longmuir* [1957] VR 456

### Other references

*Oxford English Dictionary* (online ed, Oxford University Press), accessed 13 February 2017