Tax advice and financial planners

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In July 2004 the Australian Taxation Office (ATO) issued draft determination TD2004/D22. This draft determination presented a view that tax advice given in a non-representational capacity, which was incidental to another service or advice, would not be in breach of S251L of the Income Tax Assessment Act 1936 (ITAA36). On 18 May 2005 the ATO released TD2005-16 which confirmed the views expressed in draft determination TD2004/D22.

The purpose of this paper is to examine the implications of this determination, in particular in consideration of S251L(1)(b), which is stated below. The paper addresses the issue of the provision of tax advice, in respect of the tax legislation and not from the perspective of the Corporations Act 2001.

**TAX AGENTS**

We feel it is important to state the stringent requirements for registration as a tax agent. A state-based Tax Agents’ Board (TAB) controls the registration and oversight of registered tax agents.

S251 JA provides the requirements for registration. An applicant for registration must be a “fit and proper person”. S251 BC provides a number of disqualifying factors. Regulation 156(1) prescribes the qualifications and experience necessary for a “fit and proper person”. These qualifications are both academic and provide the need for employment (with very broad experience) in the tax area. Qualifications acceptable include:

1. Degree in accountancy from an Australian university with not less than 18 months’ of commercial law, or
   The academic requirements for admission as a barrister or solicitor of the Supreme Court of a State or Territory, and
   Including a course of study in basic accounting principles and a course of study in Australian income tax law acceptable to the Tax Agents’ Board. There is also a requirement that there has been the equivalent of 12 months’ full-time relevant employment in the preceding five years.

2. Diploma or certificate from a College of Technical and Further Education (TAFE) fulfilling a course of study in accountancy, of not less than two years’ full-time study and a course of study in Australian income tax law acceptable to the Tax Agents’ Board. There is also a requirement that there has been the equivalent of two years’ full-time relevant employment in the preceding five years.

3. Equivalent of eight years’ full-time relevant employment in the preceding 10 years and either:
   – membership of CPA Australia, ICAA or NIA, or
   – completed a course of study in basic accounting principles and a course of study in Australian income tax law acceptable to the Tax Agents’ Board.
Regulation 156 Income Tax Regulations provides the qualifications and experience required of all applicants to be registered as tax agents. From an experience point of view, the TAB requires “substantial involvement in income tax matters”, which includes the preparation or examination of a broad range of income tax returns and the provision of advice in relation to income tax returns, assessments and objections.

The case law suggests that the TAB strictly interprets this provision so as to prevent registration of those it considers do not have the necessary broad practical experience.

WHAT IS ADVICE?
The Macquarie Dictionary provides the following definition of advice:

1. an opinion recommended, or offered as worthy to be followed...;
2. a communication, especially from a distance, containing information.

Therefore, it is our view that any opinion or communication of tax implications expressed by a financial planner, would be construed as “giving advice about a tax law” (S251L(1)(b) ITAA36).

DETERMINATIONS
S251L (ITAA36) is stated below:

“SECTION 251L UNREGISTERED TAX AGENTS NOT TO CHARGE FEES 251L(1) [Services for which fee not to be charged]

Subject to this section, a person who is not a registered tax agent must not knowingly or recklessly demand or receive any fee for:

a) preparing or lodging on behalf of a taxpayer a return, notice, statement, application or other document about the taxpayer’s liabilities under a taxation law; or
b) giving advice about a taxation law on behalf of a taxpayer; or
c) preparing or lodging on behalf of a taxpayer an objection under Part IV C of the Taxation Administration Act 1953 against an assessment, determination, notice or decision under a taxation law; or
d) applying for a review of, or instituting an appeal against, a decision on such an objection; or
e) on behalf of a taxpayer, dealing with the Commissioner or a person who is exercising powers or performing functions under a taxation law.

Penalty: 200 penalty units.”

We concur with the views of many commentators that it is difficult to understand the position taken by the ATO in the draft determination. Rather than provide a response to the draft determination, we have decided to focus on the examples (numbered 1 to 9) contained in paragraphs 12 to 22 of the draft determination, as below:

“Example 1
12. Matthias, an accountant, has been engaged for a fee to prepare and lodge income tax returns in respect of a small business entity and its principals’ personal income tax returns. Matthias is a registered tax agent and prepares and lodges the returns. There is no breach of paragraph 251L(1)(b) as Matthias is both a registered tax agent and is representing taxpayers in their interactions with the Commissioner.

Example 2
13. Mark, a barrister, has been engaged to provide an opinion on the taxation outcome of a transaction by a taxpayer. The opinion forms part of a Private Binding Ruling request lodged by the taxpayer with the Commissioner. Mark charges the taxpayer a fee for the taxation advice. There is no breach of paragraph 251L(1)(b). Barristers are permitted to provide advice about a taxation law and charge a fee pursuant to subsection 251L(8).

Example 3
14. Juanita, an accountant, has been engaged for a fee to provide detailed capital gains tax advice to a taxpayer about the sale of an asset. Juanita is a registered tax agent and the taxpayer is her client. There is no breach of paragraph 251L(1)(b). Such advice may not involve interactions with the Commissioner but is able to be represented by Juanita as advice which a taxpayer may rely upon to satisfy their taxation obligations.

Example 4
15. John, a book-keeper, is engaged to provide book-keeping services to a plumbing business. John’s report forms the basis of a Business Activity Statement (BAS). The plumbing
business then provides its business records to a firm of chartered accountants to prepare and lodge the BAS statements and its various income tax returns. John is not preparing or lodging an approved form or objection. Nor is John acting in a representational capacity on behalf of a taxpayer. Subsection 251L(1) therefore does not apply, nor is it necessary to consider the exception in subsection 251L(6). John may charge a fee for his book-keeping services.

Example 5
16. Carlo is an accountant but not a registered tax agent. He assists his clients to prepare their income tax returns for a fee but does not sign as an agent/preparer. Carlo has acted in a representational capacity even though he has not signed the returns as an agent of the client. Carlo is in breach of paragraph 251L(1)(b).

Example 6
17. Peter, a book-keeper, provides a range of services, including the preparation of Business Activity Statement (BAS) forms on behalf of clients. To perform this role, and to provide advice to clients, Peter would be acting in a representational capacity in giving that advice, potentially attracting paragraph 251L(1)(b).
18. Peter will not attract paragraph 251L(1)(b) where he acts in accordance with one of the legislative exceptions. For example, under subsection 251L(6) Peter is permitted to charge for this service if he:
   - is a member of recognised professional association;
   - is working under the direction of a registered tax agent; or
   - is a payroll services provider preparing a BAS for Pay As You Go purposes.

Example 7
19. Dudley, a financial adviser specialising in risk business, has been engaged on a fee paying basis to provide detailed advice to a doctor taxpayer on overall risk insurance including income protection and trauma insurance. While Dudley gives advice on the taxation treatment of this product as part of his overall financial advice, it is being provided by Dudley in a non-representational capacity. Therefore, there is no breach of section 251L(1)(b).

Example 8
20. Mary, a financial adviser in the course of recommending a financial product based savings plan, provides salary packaging advice to a taxpayer who is an employee for an up-front fee. Mary is not breaching section 251L(1)(b) because her advice is provided in a non-representational capacity; that is, the client (taxpayer) understands that they are still responsible for their tax return and that the responsibility for preparing the return rests with the taxpayer.

Example 9
21. James is a real estate agent. He is also studying accounting. He arranges the sale of an investment property on behalf of a client and advises that capital gains tax is payable by the vendor. For an additional fee, James offers to calculate the capital gains tax liability and prepare the tax return of the vendor.
22. As James is charging a fee for this service, not a registered tax agent and acting in a representational capacity, he is in breach of paragraph 251L(1)(b).”

We have no issue with example 1 at paragraph 12, example 2 at paragraph 13, example 3 paragraph 14, example 4 at paragraph 15 or example 6 at paragraphs 17 and 18. These examples clearly operate within the constraints provided by S251L.

With respect to example 5 at paragraph 16, we agree that this is a demonstration of a breach of S251L. We are aware of a real estate group which is not a registered tax agent and we are informed does not employ a legal practitioner, which prepares PAYG variation forms on behalf of taxpayers and charges a fee for this service. As demonstrated in example 5, we believe that this real estate business is in breach of S251L.

We have the view that the ATO’s suggestion in respect of example 7 (paragraph 19) is difficult to understand. Without the benefit of seeing the extent of the advice given by the financial adviser, we believe that it is impossible to say that he advice is incidental to the recommendations for risk insurance. In fact, it could be that he ability to obtain a tax deduction for the premium may be used as a significant selling point by the adviser. Similarly, it is unclear whether the adviser would have indicated that any income from the income protection or trauma insurance would be treated as assessable income in the hands of the taxpayer.

We disagree strongly with example 8 (paragraph 20). It must be understood that the main intention of salary packaging is to make better use of the available remuneration package. Of necessity, this means that the advice given must be targeted towards reducing the taxable income for the client. It would seem that this advice should be given by a registered tax agent (or practising lawyer) and that the selection of the individual financial products to be used could be referred to a financial adviser. In providing this advice, the registered tax agent should identify the type of products recommended for the client.

When we reviewed example 9 (at paragraphs 21 and 22) we had difficulty in establishing how the ATO could take the view they have taken in this example, in the light of their position in examples 7 and 8. We are all aware that financial advisers regularly calculate estimates of income tax and capital gains tax and include these in statements of advice to clients.

PROMOTION OF TAX ADVICE SERVICE
S251O (ITA36) prohibits the promotion of a tax advice service by anyone other than a registered tax agent or practising lawyer.

The relevant provision states:

“SECTION 251O ADVERTISING ETC. BY PERSONS OTHER THAN REGISTERED TAX AGENTS 251O(1) [Advertising by non-registered or non-exempted persons]
Subject to this section, a person, not being a registered tax agent or a person exempted under section 251L, shall not, directly or indirectly:

a) describe himself as or represent himself to be a tax agent; or
b) advertise in any manner whatsoever that income tax returns will be prepared by him or that any other matter in connexion with income tax will be attended to by him.

Penalty: $1,000.

251O(2) [Exemption for legal representatives and approved persons]
Paragraph (1)(b) does not apply in relation to advertising that relates to acts or things done or to be done:

a) by a solicitor or counsel acting in the course of his or her profession.
is the interpretation of the tax law which governs the provision of tax advice. Clearly, both the ATO and ASIC have chosen the path which provides the greatest possible option to financial advisers. It is interesting to contrast, however, the differing view of the ATO when it comes to tax advice being provided by other professional- 
as, as demonstrated in example 9 of the draft determination.

ADVISER’S DUTY

It is indicated in Boyer v Balkin 95ATC4609 (affirmed in the Court of Appeal) that advisers have a duty, when giving advice, to consider all relevant tax matters and to minimise the tax liability of the client. If the relevant tax expertise is not available, “they must either seek the assistance of another practitioner who is competent in tax, or else advise the client to instruct a person who is able to provide the tax advice needed” (Woellner, 2005: 1892).

In Newman & Ors v Financial Wisdom Ltd & Anor (2004) VSC 216, it was held that the financial advisers were liable for losses incurred by investors in tax schemes, where negligent and misleading advice was provided to the client.

Some financial planners, in their disclaimers, specifically state that there is no tax advice given, even though such advice has been given. If tax advice is incorporated in the overall advice, in our view, a disclaimer cannot be effective.

The disclaimers sometimes refer the client to seek further tax advice. In such situations financial planners should be pro-active in ensuring that clients obtain such further professional tax advice. In seeking further expert advice, it is important that the adviser seeking the expert advice and communicating that advice to the client (whether or not as part of a statement of advice) understands the expert advice given. In the event of a dispute, it is possible under the doctrine of contributory negligence that both the adviser and the expert could be held liable, EVBj Pty Ltd & Anor v Greenwood and Ors 88 ATC 4977 (Woellner, 2005: 1894).

CONCLUSION

The determination TD2005-16 will allow financial advisers to give incidental tax advice. There are significant differences between the educational requirements of registered tax agents and financial advisers, with respect to tax law. This presents two issues:

I the quality of the advice; and
II the issue of what constitutes incidental advice.

It is our contention that the ATO – and not ASIC – has the necessary expertise to ensure the quality of tax advice.

BIBLIOGRAPHY

Income Tax Assessment Act 1936 and Regulations.
Corporations Act 2001 and Regulations.

Neale, R & Smith L, To advise or not to advise: a taxing question, Taxation in Australia, October 2003: Taxation Institute of Australia.