

## **EXPLANATORY STATEMENT**

### **STATUTORY RULES 2008 No.**

#### **Issued by authority of the Assistant Treasurer and Minister for Competition Policy and Consumer Affairs**

*Taxation Administration Act 1953*

*Taxation Administration Amendment Regulations 2008 (No. )*

Section 18 of the *Taxation Administration Act 1953* (TAA 1953) provides that the Governor-General may make regulations, not inconsistent with the TAA 1953, prescribing all matters which by the TAA 1953 are required or permitted to be prescribed, or which are necessary or convenient to be prescribed for giving effect to the TAA 1953.

Subsection 359-40(1) of Schedule 1 to the TAA 1953 provides that if making a private ruling would require determining the value of any thing, the Commissioner of Taxation (the Commissioner) may refer the making of a valuation to a valuer, or refer a valuation provided by the applicant for a private ruling (the applicant) to a valuer for review. Subsection 359-40 (4) provides that the Commissioner may charge the applicant an amount in accordance with the regulations for the valuer making or reviewing the valuation.

The purpose of the Regulations is to amend the *Taxation Administration Regulations 1976* to give effect to subsection 359-40(4) of Schedule 1 of the TAA 1953.

There is no charge associated with obtaining a private ruling from the Australian Taxation Office. However, where, as part of a private ruling, the Commissioner refers a valuation to a valuer, the Commissioner may charge the applicant an amount equal to the amount the Commissioner was charged for the valuer making or reviewing the valuation.

The Commissioner must provide an estimate of the charge to the applicant up front. The valuation will not commence until the estimated amount has been paid. If the final cost of the valuation differs from the estimate provided by the Commissioner, the applicant will either be charged or refunded the difference, as applicable.

Details of the Regulations are set out in Attachment A.

The Act specifies no conditions that need to be met before the power to make the proposed Regulations may be exercised.

The Regulations commenced on the day after they were registered.

The Regulations are legislative instruments for the purposes of the *Legislative Instruments Act 2003*.

[Insert outcome of consultation]

## ATTACHMENT A

### Background

In accordance with subsection 359-40(1) of Schedule 1 to the TAA 1953, if a private ruling requires the Commissioner to determine the value of any thing, the Commissioner may:

- refer the valuation to a valuer or
- refer the valuation supplied by the applicant for a review.

In both cases, the applicant must agree that the valuation or review shall proceed. If so, the applicant must also pay a sum required by the Commissioner before the Commissioner will instruct the valuer to commence the valuation or review.

Subsection 359-40(4) of the TAA 1953 states that the Commissioner may charge the applicant an amount in accordance with the regulations for the valuer making or reviewing the valuation

### Detail of the amendments in Taxation Administration Amendment Regulations 2008 (No )

#### *Regulation 1 — Name of Regulations*

Regulation 1 provides that these Regulations are the *Taxation Administration Amendment Regulations 2008 (No. )*.

#### *Regulation 2 — Commencement*

Regulation 2 provides that these Regulations commenced on the day after they are registered.

#### *Regulation 3 — Amendment of Taxation Administration Regulations 1976*

Regulation 3 provides that Schedule 1 amends the *Taxation Administration Regulations 1976*.

#### *Schedule 1*

This Schedule inserts Part 7 into the *Tax Administration Regulations 1976*.

Regulations 60 to 63 describe the circumstances in which the Commissioner can charge for the making or reviewing of a valuation as part of a private ruling, and the procedures surrounding such a process.

## **Applications for private rulings to which the regulations apply**

These regulations apply in relation to an application for a private ruling made on or after the day they commence.

### ***Under what circumstances can the Commissioner charge for a valuation?***

If making a private ruling would require determining the value of any thing, the Commissioner can charge taxpayers for a valuation or a review of a valuation associated with a private ruling where the Commissioner:

- requests a valuer to make a valuation, or
- requests a valuer to review a valuation provided by the applicant.

A review of a valuation will examine, among other things, whether the methodology used, and assumptions made, are appropriate in coming to the valuation provided. Where the review concludes that the valuation is defective in some way, for example, an inappropriate methodology has been used, the review will not provide an alternate valuation. In such a case, the taxpayer would have the option of obtaining a new valuation themselves and submitting it for review, or requesting that the Commissioner make a valuation for them.

### ***What is the amount the Commissioner can charge?***

The amount the Commissioner can charge must be equal to the amount the Commissioner is required to pay the valuer for making or reviewing the valuation.

The valuer would usually charge the Commissioner on a commercial basis that may include, among other things:

- an hourly labour rate for the valuer's time,
- valuer's travel and accommodation costs, and
- GST

#### ***Example 1.1***

As part of a private ruling John requires a valuation of his shares in a private company for tax purposes. The Commissioner provides an estimate to John based on advice from a valuer that the valuation will cost \$500. John agrees for the valuation to proceed and pays the Commissioner \$500. The valuation is undertaken and the Commissioner pays \$500 to the valuer. A private ruling is provided to John on the basis of that valuation.

#### ***Example 1.2***

Sandra applies for a private ruling asking "Will the Commissioner accept \$500,000 as the value of my commercial property for depreciation purposes based on the attached valuation"? The Commissioner decides to

refer Sandra's valuation to a valuer for review. The valuer estimates it will cost \$1500 to review the valuation. The Commissioner advises Sandra of this estimate, which she pays. The Commissioner then instructs the valuer to conduct the review. The review indicates that Sandra's valuation is not acceptable, because an inappropriate valuation methodology has been used. The Commissioner provides Sandra with a ruling stating this. Sandra has the usual objection rights that apply to a private ruling.

As already mentioned, the outcome of the valuation review process will be either acceptance or non-acceptance of the valuation submitted for review. It does not provide an alternative valuation as the process of review differs from the actual valuation process.

### ***Where the valuer does not charge the Commissioner GST***

There could be instances where a government authority may perform the valuation (for example, the Australian Valuation Office). Such a body may not charge the Tax Office GST for its services. However, the provision of a valuation service by the Tax Office is a taxable supply, and subject to GST. Where the Commissioner receives an estimate for the cost of a valuation which does not include GST, the appropriate amount of GST will be added to the estimate and charged to the applicant.

#### ***Example 1.3***

Fred applies for a private ruling requiring the Commissioner to determine the value of his printing press for tax purposes. The Commissioner requests a valuer to make a valuation. The Commissioner is charged \$300 for the making of the valuation (not including GST). The amount the Commissioner will charge Fred for the making of the valuation is \$300, plus \$30 for the GST liability associated with the valuation, making a total of \$330.

### ***Cost of engagement of a valuer may be tax deductible for the applicant***

Paragraph 25-5(1)(a) of the *Income Tax Assessment Act 1997* allows a taxpayer to deduct expenditure incurred to the extent that it is for managing their tax affairs. Under this section, non-capital costs incurred by the taxpayer for the making or reviewing of a valuation as part of an application for a private ruling required for managing their tax affairs may be deductible for income tax purposes.

### ***The Commissioner's discretion not to charge***

The Commissioner will generally refer a matter requiring the determination or review of the value of any thing to a valuer. However, if the Commissioner decides that the value of any thing can be determined without referring the valuation or review to a valuer, the Commissioner has the discretion not to refer the valuation to the valuer, and consequently there would be no charge. It is expected that this would only happen in rare circumstances.

#### *Example 1.4*

A husband and wife own equal shares in a property. They approach the Tax Office at the same time, each seeking a private ruling on the value of the property for tax purposes. All relevant facts are identical.

The law requires the Commissioner to issue a private ruling to each person. Given the identical circumstances, he would only have to refer the valuation to a valuer once. The Commissioner would charge only one applicant for the valuation.

#### ***The Commissioner must notify the taxpayer about the estimated cost of the valuation***

Where an application for a private ruling causes the Commissioner to refer valuation work to a valuer, the Commissioner must obtain an estimate of how much it will cost to make or review the valuation, and inform the applicant of the estimated cost.

Once the Commissioner obtains this estimate, the Commissioner must provide the applicant with a notice that includes:

- an explanation that the cost to the applicant for making or reviewing the valuation is the amount that the Commissioner is required to pay the valuer for making or reviewing the valuation;
- the estimated amount of the charge; and either
  - a statement advising that the estimated amount of the charge must be paid before the valuation will be conducted by the valuer; or
  - a statement advising that the estimated amount of the charge can be paid in instalments (see below), identifying the amount of the first instalment, and advising the applicant that each instalment must be paid before the part or stage of the valuation or review to which the instalment relates is conducted.

Once the applicant has been informed of the estimated cost of the valuation work, they are under no obligation to proceed with the valuation or review. The applicant will be required to indicate their agreement to proceed with the valuation work by paying the estimated charge before the valuer will begin the valuation work.

#### ***Payment in instalments***

A valuation or review may need to be completed in parts or stages (for example, if it is complex). Where the valuer determines that payment by instalments is appropriate, they will advise the Commissioner. The Commissioner will then inform the applicant that they can pay in instalments. However, the Commissioner is not required to determine that the charge may be paid in instalments for any particular valuation or review.

### *Example 1.5*

As part of an application for a private ruling, a large mining company requires the valuation of a gold mine for tax purposes. The Commissioner provides the applicant with a notice advising that the valuation will be conducted in four stages due to the size of the task. The notice advises the applicant of the estimated total cost of the valuation, and the amount of the first instalment.

The applicant indicates their agreement to proceed with the valuation by paying the first instalment.

Following stages of the valuation will commence once the relevant instalments are paid.

### ***Declining to rule on a value***

Subsection 359-35(2)(a) of Schedule 1 of the TAA 1953 allows the Commissioner to decline to make a ruling if the Commissioner considers that making the ruling would prejudice or unduly restrict the administration of a taxation law. Therefore, where the applicant does not indicate their agreement to proceed by paying the estimated amount of the charge (or the applicable instalment) within a reasonable time, it would be open to the Commissioner to conclude that the applicant does not wish to proceed with their application and decline to rule.

The Commissioner must provide the applicant with written reasons for declining to make the private ruling.

### *Example 1.6*

Luke applies for a private ruling that requires the valuation of his investment property for tax purposes. The Commissioner provides Luke with a notice estimating the amount of the charge required to conduct the valuation. Luke does not indicate his agreement to proceed by paying the amount of the estimated charge for the valuation.

The Commissioner declines to make the private ruling and provides Luke with a written explanation of the reasons for declining to rule.

### ***Difference between estimated and actual charge for valuations and review of valuations***

The final charge for the cost of a valuation or a review of a valuation can be less than or greater than the estimate provided by the Commissioner. An estimate is not a guarantee of the final cost of a valuation. If the cost of the valuation is greater than the estimate, the Commissioner is permitted to recover the outstanding amount from the applicant. The Commissioner will arrange for a final invoice to be sent to the applicant to collect the difference. The outstanding amount becomes a debt due to the Commonwealth (this is not recoverable as a tax-related liability under Part 4-15 of Schedule 1 to the TAA 1953).

Where the amount of the charge payable to the Commissioner is less than the estimate provided by the Commissioner and paid by the applicant, the Commissioner must refund to the applicant an amount equal to the difference as soon as practicable.

The charge is for making or reviewing the valuation and not for making the ruling. If a taxpayer applies for a private ruling that requires a valuation or review, and then subsequently withdraws the application part-way through the valuation process, the taxpayer is still liable for the amount the Commissioner is required to pay the valuer for their work up to that point.

*Example 1.7*

Sarah applies for a private ruling requiring a valuation of an item of property for tax purposes. The Commissioner provides Sarah with a notice estimating the amount of the charge of the valuation at \$1000, which Sarah pays. The valuer completes the valuation but only charges the Commissioner \$800.

The Commissioner provides Sarah with a refund of \$200 as soon as practicable.

*Example 1.8*

Daniel applies for a private ruling requiring the valuation of a plantation for tax purposes. The Commissioner provides Daniel with a notice estimating the cost of the valuation at \$2000, which Daniel pays.

Daniel withdraws his application part-way through the valuation process. As a result, the Commissioner instructs the valuer to stop work and the valuer charges the Commissioner \$1400 for the work already completed.

The Commissioner must provide Daniel with a refund of \$600 as soon as practicable.

***Time taken to finalise a private ruling which requires the value of any thing***

Section 359-50 in Schedule 1 to the TAA 1953 provides that if the Commissioner has not issued a private ruling or declined to make a private ruling within 60 days of the application being lodged, the applicant may give the Commissioner a notice requiring the Commissioner to make the ruling. The 60 days may be extended by a 'stop the clock' period starting on the day the Commissioner tells the applicant about the referral and ending on the day on which the Commissioner tells the applicant that the valuer has completed their work in relation to the valuation.

*Example 1.9*

Angela applies for a private ruling requiring the valuation of an item of property for tax purposes.

The Commissioner issues a notice advising Angela that he has asked a valuer to provide an estimate of the cost to undertake the valuation. This notice begins the 'stop the clock' period.

The Commissioner receives the estimate from the valuer and issues a notice to Angela showing the estimated amount of the charge. Angela pays the amount.

The valuer completes the valuation and charges the Commissioner the estimated amount of the charge. The Commissioner informs Angela that the valuation has been completed.

This concludes the 'stop the clock' period. The 60 day period mentioned above is extended by the number of days in the period starting on the day the initial notice was sent to Angela (advising her that the valuation has been referred to a valuer) and ending on the day that she was informed that the valuation has been completed by the valuer.

The Commissioner will not issue the ruling to which the valuation relates until the amount of any outstanding debt is paid. If the debt is not paid within a reasonable time, the Commissioner will decline to make the ruling in accordance with paragraph 359-35(2)(a) of Schedule 1 of the Act.