

QUESTION WE'VE BEEN ASKED QB 15/07

TAX ADMINISTRATION ACT 1994 – MEANING OF “DUE AND PAYABLE” UNDER SECTION 91E(4)(d)(i)

Legislative references are to the Tax Administration Act 1994.

This Question We've Been Asked is about s 91E(4)(d)(i).

Question

1. We have been asked when a tax, duty or levy will be considered to be “due and payable” under s 91E(4)(d)(i).

Answer

2. A tax, duty or levy (tax type) becomes due and payable on the due date for payment of the relevant tax type and tax period.
3. Therefore, under s 91E(4)(d)(i) the Commissioner may not make a private ruling on a matter, unless the application is received before the due date for payment of the relevant tax type for the tax period to which the matter relates. For income tax generally, this is the due date for terminal tax payments for an income year (and does not include any provisional tax). For other types of tax (such as GST, PAYE, RWT and NRWT) this is the due date for payment of tax for the relevant period in respect of which the Commissioner has been asked to rule.

Explanation

4. **The Commissioner's ability to make private rulings is provided in s 91E.** Section 91E(4) sets out when the Commissioner may not make a private ruling. Relevantly, s 91E(4)(d)(i) provides:
 - (4) The Commissioner may not make a private ruling if—
 - ...
 - (d) the matter on which the ruling is sought—
 - (i) concerns a tax (excluding provisional tax), duty, or levy that is due and payable, unless the application is received before the tax (excluding provisional tax), duty, or levy is due and payable; or
 - ...
5. Relevantly, the Commissioner may not make a private ruling if the matter on which the ruling is sought concerns a tax type that is due and payable (unless the application is received before the relevant tax type becomes due and payable).
6. The taxation laws in respect of which binding rulings may be made are contained in s 91C. For the purposes of s 91E(4)(d)(i), the matter on which a private ruling is sought must concern a tax type imposed by a taxation law included in s 91C. The ability to rule under s 91E(4)(d)(i) must be considered in respect of the relevant tax type and for the relevant tax period on which the Commissioner has been asked to rule. The question **that arises is what “due and payable”** means, as this term is not defined in the tax legislation.
7. The Commissioner notes that s 91E(4)(d)(i) specifically excludes provisional tax. Any due dates for payment of any provisional tax are not taken into account when determining whether any income tax is due and payable.
8. **The term “tax payable” is defined in s 120C**, for the purposes of Part 7 - Interest, as meaning:

At any time, means the amount of tax payable in respect of a tax liability by that time, determined in accordance with the tax laws; and includes an amount of tax that must be withheld or deducted under a tax law and paid to the Commissioner.

9. However, the conjunction between **“due” and “payable”** in s 91E(4)(d)(i) indicates that not only must the particular tax type be payable, it must also be due to be paid. Generally, there is a period of time between when a tax becomes payable and when it must be paid. This allows taxpayers time to calculate the amount and prepare the relevant tax return.
10. **The term “due date” is defined in s 3(1).** Unless the context otherwise requires, **“due date” means:**
 - due date** means the last day on which a taxpayer is able—
 - (a) to pay tax; or
 - (b) to provide a tax return; or
 - (c) to provide a tax form; or
 - (d) to do any other thing under a tax law,—before being liable to pay a penalty or (in the case of paragraph (a)) interest under Part 7:
11. **The “due date” is the last day on which a taxpayer is able to** pay tax, provide a tax return or tax form, or do any other thing under a tax law before being liable for a penalty or interest under Part 7.
12. For the purposes of s 91E(4)(d)(i), a matter will concern a tax type that is **“due and payable”** on the due date for payment of that tax type for the relevant period in respect of which the Commissioner has been asked to rule.
13. However, there is no requirement that an actual amount of tax is payable or quantified before s 91E(4)(d)(i) will apply. The Commissioner considers it sufficient that the relevant due date for payment of a particular tax type (for a tax period) has passed, regardless of whether an amount of tax is actually payable. The relevant question is whether, if any tax was payable in respect of a particular tax type and period on which the Commissioner has been asked to rule, the relevant due date for payment of that tax type for that tax period has passed. What this means is that, where there is the **potential** that a tax liability could exist in respect of the matter on which a ruling is sought, the Commissioner is not required to first determine whether there is, in fact, a tax liability or how much it would be. The question of whether the Commissioner is precluded from ruling under s 91E(4)(d)(i) must be resolved at the beginning of the rulings process before considering the relevant tax issues.
14. In addition, s 91E(4)(f) precludes the Commissioner from making a private ruling if an assessment has already been made. The Commissioner considers that s 91E(4)(d)(i) operates to extend this rule to include situations where a taxpayer has not filed a tax return and/or an assessment has not been made by the relevant due date for payment of the tax type concerned. Therefore, whether or not an assessment has been made, as long as the relevant due date for payment of the particular tax type for the relevant period has passed, the Commissioner may not issue a private ruling.
15. The Commissioner’s **inability to** make a private ruling in such a situation is aligned with the purpose of the binding rulings regime. Section 91A states:

Binding Rulings

91A Purpose of this Part

The purpose of this Part is to—

- (a) provide taxpayers with certainty about the way the Commissioner will apply taxation laws; and

(b) help them to meet their obligations under those laws, —

by enabling the Commissioner to issue rulings that will bind the Commissioner on the application of those laws. The Part also recognises the importance of collecting the taxes imposed by Parliament and the need for full and accurate disclosure by taxpayers who seek to obtain binding rulings.

16. The binding rulings regime enables taxpayers to obtain certainty about how the Commissioner will apply tax laws and helps taxpayers comply with their tax obligations. However, by the relevant due date, a taxpayer will already have been required to file their tax return and make an assessment on that tax type for that period.
17. Once a self-assessment has been made regarding a tax type and for a relevant period, the disputes resolution process is available to the taxpayer should there be any disagreement with that assessment. There is a clear legislative policy that the binding rulings regime should not overlap with the disputes resolution process. The answer to this question **we've been asked** is consistent with the purpose of the binding rulings regime and the disputes resolution process.

Conclusion

18. Section 91E(4)(d)(i) applies where the tax type that the matter concerns is due and payable for the relevant period. A tax will be due and payable on the due date for payment of that tax type and tax period (excluding, in the case of income tax, any provisional tax payments). Consequently, unless the application is received before that due date (whether or not a tax liability actually exists), the Commissioner may not issue a private ruling on that matter.

Examples

19. The following examples are included to assist in explaining the application of the law.

Example 1: Income Tax

20. Company A has a standard 31 March balance date and is linked to a tax agent. **Company A's terminal tax date is 7 April.** Company A is required to pay provisional tax.
21. On 31 October Company A applies for a private ruling on the deductibility of an amount of expenditure incurred in the previous tax year. **Company A's tax return** is not due until the following 31 March (so s 91E(4)(f) does not apply). Further, the relevant due date for payment of **Company A's terminal tax** is 7 April of that following year. Because the ruling application is received by the Commissioner **before Company A's terminal tax date for income tax**, s 91E(4)(d)(i) will not apply. Any provisional tax liabilities are not relevant for these purposes (as they are excluded by s 91E(4)(d)(i)).

Example 2: Income Tax

22. Individual X decides to apply for a private ruling on whether an amount received two years ago from the sale of a property was of a capital or revenue nature. Individual X did not have a tax agent at that time and did not file a tax return (so the exclusion in s 91E(4)(f) does not apply). Individual X submits that the amount is a capital receipt, and so considers that no amount is due and payable. However, the Commissioner will not make a ruling in this situation because there is the potential for a tax liability to exist that was due and payable before the application was received.

Example 3: Goods and Services Tax

23. Company B is registered for GST and applies for a private ruling on whether a supply that occurred in the taxable period ending 30 September was zero rated. The due date for payment is 28 October.
24. The Commissioner receives the application on 15 October, at which point Company B has not yet filed its GST return and made its assessment. As the application is received before the due date for payment (and before an assessment has been made), the Commissioner is able to make a private ruling.

Example 4: Resident Withholding Tax

25. Company C withholds less than \$500 per month of RWT on interest paid and so is eligible to pay the RWT withheld to the Commissioner in two instalments for the tax year. The instalments are due by 20 October and 20 April the following year.
26. Company C applies for a private ruling on various matters, including the RWT withheld from interest during the first instalment period of 1 April to 30 September. The Commissioner receives the application on 12 October. As this is before the due date of 20 October, the Commissioner is able to make a private ruling on the RWT withheld.
27. If the application was received on 21 October, the Commissioner would not be able to make a private ruling in respect of the RWT for the first instalment period, but could make a private ruling in respect of the second instalment period.

References

Legislative references

Tax Administration Act 1994, ss 3(1), 91A, 91E(4)(d)(i) and 120C.