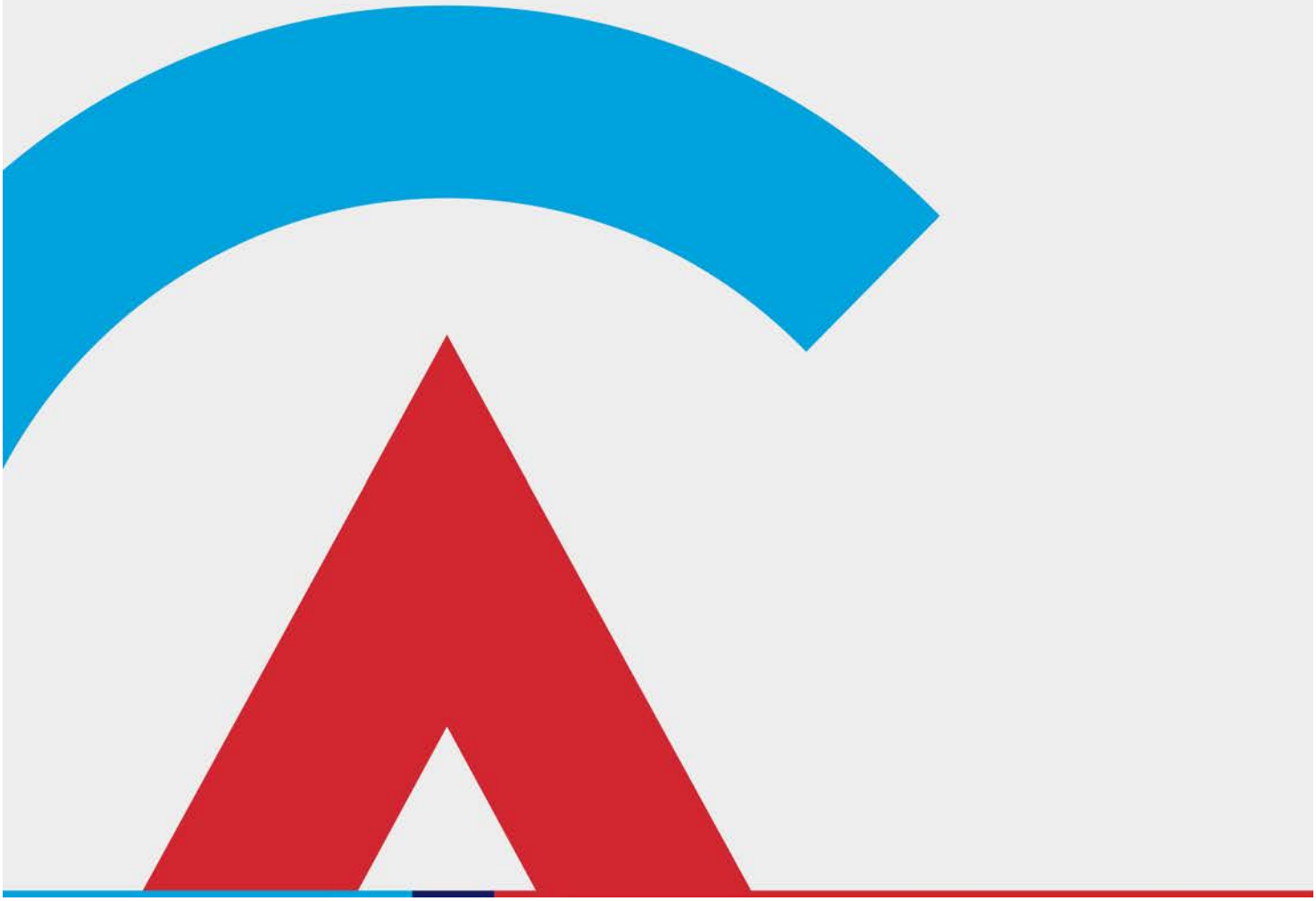
Application of discretion in s 18D(2) TAA – an exception to confidentiality ED0210

15 August 2019



charteredaccountantsanz.com

CHARTERED ACCOUNTANTS™
AUSTRALIA + NEW ZEALAND

15 August 2019

Manager, Technical Standards
Office of the Chief Tax Counsel
National Office
Inland Revenue Department
PO Box 2198
Wellington

Dear Rob

ED0210 Application of discretion in s 18D(2) TAA – an exception to confidentiality

Chartered Accountants Australia and New Zealand (CA ANZ) appreciates the opportunity to provide feedback on the draft Standard Practice Statement (SPS). The SPS sets out how the Commissioner will exercise a statutory discretion t to provide sensitive revenue information as an exception to the rule of confidentiality.

CA ANZ supports the publication of the statement which we note is essentially the same as SPS 11/07 with updated section references.

We have set out below our recommendations which we hope you find helpful.

1. Narrowing the Secrecy Rule

The SPS notes that the old section 81 secrecy rule has been replaced by a new section 18 confidentiality rule[1]. In our opinion, there are two options. The SPS can be written on a prospective basis and omit all reference to section 81, alternatively it could refer to section 81 but explain its relevance in more detail. If you choose the latter option, the SPS should state what the old rule was and how that rule has now been significantly narrowed.

The recent replacement of the secrecy rule[2] is a significant change. The former rule explicitly required "the secrecy of all matters" whereas under the new rule "sensitive revenue information" is protected. Sensitive revenue information is defined in section 16C as information that relates to the affairs of a person or entity that:

[1] ED0210 paragraph 1, page 1
[2] Taxation (Annual Rates for the 2018-19, Modernising Tax Administration, and Remedial Matters) Act 2019

Chartered Accountants Australia and New Zealand
Carlaw Park, 12-16 Nicholls Lane, Parnell, Auckland 1010
PO Box 3334, Shortland Street, Auckland 1140 P +64 9 917 5915

- identifies or could identify a taxpayer, whether directly or indirectly;
- might reasonably be regarded as private, commercially sensitive or otherwise confidential; or
- the release of which could result in loss, harm or prejudice to a person to whom or which it relates.

The new rule therefore protects information about taxpayers, including where it might be commercially or personally sensitive. It protects not only information that directly identifies the taxpayer, but also information that could indirectly identify a taxpayer. The test is whether the information is "reasonably" capable of being used to identify a taxpayer. Whether this is reasonably capable of occurring depends on the facts, including the resources that would be required to use the relevant information to identify a taxpayer. However, if it is reasonably foreseeable that someone could identify a taxpayer using the information, including in combination with other information that they may have or could acquire, then the information should be treated as "sensitive revenue information".

A protection is also retained (subsection 18(3)) for information that, while not specifically about taxpayers, is still highly sensitive and could adversely affect the integrity of the tax system or prejudice the maintenance of the law if released. This would include information about matters such as audit or investigative techniques or strategies, compliance information, thresholds, analytical approaches and so on. The release of such information, if not protected, could affect the Crown's ability to collect revenue. CA ANZ notes that the disclosure of audit activity or investigative techniques will often increase tax compliance as tax agents will be able to encourage such acquiescence.[3]

Section 18(3) should be read in combination with section 6 with regards to integrity of the tax system. Therefore, it is necessary to consider whether disclosing the information would adversely affect taxpayer perceptions of fairness and impartiality, that all taxpayers must comply with the law, and that Inland Revenue keeps individuals' tax affairs confidential. A key consideration is the potential impact of releasing the information on compliance behaviour – information that would enable defrauding or gaming of the tax rules should not be released[4].

It is important that Inland Revenue find the right balance when deciding to release information. In our view the release of high level information, including the focus of IR audit activity on a particular industry or the issuance of a Revenue Alert on a matter of concern to IR, should ultimately enhance compliance.

[3] CA ANZ Submission to Inland Revenue on *"Making Tax Simpler: Proposals for Modernising the Tax Administration Act"* at 12

[4] Tax Information Bulletin Volume 31 No 4 May 2019

2. Paragraph 1: sensitive revenue information

Paragraph 1 (lines 8 and 9) should explicitly state that section 18D(2) "… provides IR with a broad discretion to disclose ***sensitive revenue*** information...".

3. Paragraph 2: clarify

Paragraph 2 states:

The TAA goes so far as to protect all revenue related information, including that which does not identify specific taxpayer affairs ("Revenue Information"). *Revenue information is not subject to the rule of confidentiality and therefore does not require a "permitted disclosure" However, under s 18(3) revenue information can only be released if it does not adversely affect the integrity of the tax system or prejudice the maintenance of the law"* (emphasis added)
In our view the above commentary may be confusing to readers. The SPS would be improved if the first sentence was rewritten. The SPS should clearly distinguish "revenue information" and "sensitive revenue information".

4. Editorial corrections

Paragraph 1. The first line refers to "*recently amended by the Taxation Annual Rates for 2018-19, Modernising Tax Administration, and Remedial Matters) Act 2019".* If the SPS applies for a number of years, like SPS 11/07, the word *"recently"* could be misleading.
Example 4, page 20, section 18D(1) the answer contains two full stops.

We would be happy to discuss our submission with you.

Yours sincerely

John Cuthbertson CA

New Zealand Tax Leader

Teri Welham CA

Senior Tax Advocate