

Exposure Draft TPB Information Sheet TPB(I) D48/2022

What is a tax agent service?

Tax Practitioners Board exposure draft

The Tax Practitioners Board (TPB) has released this draft Information Sheet (TPB(I) D48/2022) as an exposure draft and invites comments and submissions in relation to the information contained in it within 42 days. The closing date for submissions is 12 September 2022. The TPB will then consider any submissions before settling its position, undertaking any further consultation required and finalising the TPB(I).

Written submissions should be made via email at tpbsubmissions@tpb.gov.au or by mail to:

Tax Practitioners Board

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Disclaimer

This document is in draft form, and when finalised, will be intended as information only. It provides information regarding the TPB's position on the application of subsection 90-5 of the *Tax Agent Services Act 2009* (TASA), containing the definition of a tax agent service.

While it seeks to provide practical assistance and explanation, it does not exhaust, prescribe or limit the scope of the TPB's powers in the TASA.

In addition, please note that the principles, explanations and examples in this draft TPB(I) do not constitute legal advice and do not create additional rights or legal obligations beyond those that are contained in the TASA or which may exist at law. Please refer to the TASA for the precise content of the legislative requirements.

Document history

This draft information sheet was issued on 1 August 2022 and is based on the TASA as at 7 February 2022 (latest version available at the time of publication).

Issued: 1 August 2022

Introduction

1. Entities that provide tax agent services for a fee or other reward¹ must be registered with the Tax Practitioners Board (TPB).
2. The TPB has prepared this draft Information Sheet (TPB(I)) to assist entities to determine if they are providing a tax agent service and whether they need to register with the TPB.
3. Whether a particular service is a tax agent service is a question of fact. This means each service will need to be considered on a case-by-case basis having regard to the facts and circumstances surrounding the provision of the service.
4. There are significant civil penalties for anyone providing tax agent services for a fee or reward or advertising tax agent services, while unregistered.²

What is a tax agent service?

Legislative background

5. A tax agent service is defined in section 90-5 of the *Tax Agent Services Act 2009* (TASA) as:
 - (1) A **tax agent service** is any service:
 - (a) that relates to:
 - (i) ascertaining liabilities, obligations or entitlements of an entity that arise, or could arise, under a taxation law; or
 - (ii) advising an entity about liabilities, obligations or entitlements of the entity or another entity that arise, or could arise, under a taxation law; or
 - (iii) representing an entity in their dealings with the Commissioner³; and
 - (b) that is provided in circumstances where the entity can reasonably be expected to rely on the service for either or both of the following purposes:
 - (i) to satisfy liabilities or obligations that arise, or could arise, under a taxation law;
 - (ii) to claim entitlements that arise, or could arise, under a taxation law.
 - (2) A service specified in the regulations for the purposes of this subsection is not a **tax agent service**.

¹ For more information on what is a fee or other reward see [TPB\(I\) D49/2022 What is a fee or other reward?](#)

² Refer to section 50-5 of the *Tax Agent Services Act 2009* for further information.

³ Commissioner of Taxation.

Taxation law

6. Taxation law is defined in subsection 995-1(1) of the *Income Tax Assessment Act 1997* (ITAA 1997) to mean:

- an Act of which the Commissioner has the general administration (including a part of an Act to the extent to which the Commissioner has the general administration of the Act); or
- legislative instruments made under such an Act (including such a part of an Act); or
- the TASA or regulations made under the TASA.

Elements of a tax agent service

The definition of a tax agent service can be explained by way of three elements. One of the first two elements (Element 1 or 2) and Element 3 must be satisfied in order to meet the definition of a tax agent service.

| | |
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| Element 1 Service relates to ascertaining or advising a client about liabilities, obligations or entitlements under a taxation law | To be a tax agent service, the service must relate to: <ul style="list-style-type: none">• ascertaining liabilities, obligations or entitlements of an entity (or client) that arise, or could arise under a taxation law, or• advising an entity (or client) about liabilities, obligations or entitlements of the entity (or client) or another entity that arise, or could arise, under a taxation law. |
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OR

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| Element 2 Representing a client in their dealings with the Commissioner | To be a tax agent service, it must be a service that represents an entity (or client) in their dealings with the Commissioner. |
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AND

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| Element 3 Client relies on the service | A service will be a tax agent service only if it is provided in a circumstance where the entity (or client) can reasonably be expected to rely on the service for either or both of the following: <ul style="list-style-type: none">• to satisfy liabilities or obligations that arise, or could arise, under a taxation law, or• to claim entitlements that arise, or could arise, under a taxation law. |
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When will a client be reasonably expected to rely on a service?

7. To determine circumstances in which a client can reasonably be expected to rely on a service being provided, it is necessary to consider the facts and circumstances surrounding the provision of the service. Some of the key facts and circumstances to consider, include:
- whether the provider of the service has to interpret or apply a taxation law and therefore requires a certain level of knowledge about the taxation law
 - whether the provider of the service applies knowledge of the taxation law to a client's individual circumstances
 - whether the client, or another entity, checks or reviews the work before relying on it
 - whether the provider of the service intends for the client to rely on the advice or information provided
 - whether the client has a relative lack of knowledge or prior experience in relation to the tax agent service, perhaps indicating that the client regards the skill and experience of the entity providing the service as superior to their own
 - the availability of other experts and the ability of a client to form their own judgement or rely on their own knowledge
 - the circumstances surrounding the provision of the service, including the nature of the relationship/dealing between the parties. For example, whether the service is provided as part of a formal consultation or merely during the course of a casual conversation/engagement
 - whether the client has specifically requested the service or has paid for the service
 - the level of complexity surrounding the service
 - whether the provider of the service suggested or encouraged the client to seek further advice in relation to the matter
 - the nature of the advice or information given. For example, it will unlikely be reasonable to expect a client to rely on a provisional opinion in speculative circumstances of an 'off-the-cuff' statement whether the service provider gave an indication that they possessed greater knowledge or skill in relation to the matter
 - whether the provider of the service has provided an effective disclaimer against responsibility for the service. However, the existence of a disclaimer does not automatically absolve the entity providing the service from registration. Additionally, the effect of such a disclaimer will generally depend on all the circumstances of the case, including the relative knowledge and skill of the provider and the complexity and/or significance of the service provided.⁴

⁴ Use of the word 'disclaimer' in this paragraph means a general disclaimer.

What is not a tax agent service?

8. Regulation 13 of the Tax Agent Services Regulations 2022 (TASR) specifies services that are not tax agent services, including services provided by:
- an auditor of a self-managed superannuation fund under the *Superannuation Industry (Supervision) Act 1993*
 - an entity to a related entity⁵
 - a related entity of an entity (the first entity) to another related entity of the first entity
 - a trustee of a trust (or a related entity of the trustee) to the trust, or a member of the trust, in relation to the trust
 - a trustee of a trust (or a related entity of the trustee) to a wholly owned or controlled entity of the trust in relation to the entity
 - a responsible entity of a managed investment scheme (or a related entity of the responsible entity, the manager of the managed investment scheme or the operator of the managed investment scheme) to the scheme, or a member of the scheme, in relation to the scheme
 - an operator of a notified foreign passport fund or a related entity of the operator to the fund, or a member of the fund, in relation to the fund
 - a partner in a partnership (or a related entity of the partner) to another partner of the partnership in relation to the partnership
 - a member of a joint venture (or a related entity of the member) to another member of the joint venture or an entity established to pursue the joint venture:
 - in accordance with a written agreement and
 - in relation to the joint venture
 - a financial services licensee or an authorised representative of the licensee that is a custodial or depository service
 - an entity (the first entity) to an entity previously owned by the first entity (the second entity) in relation to the second entity's obligations under a taxation law for the income year in which it was sold by the first entity
 - an actuary, that is required by a law of the Commonwealth or of a State or Territory, to be provided only by an actuary
 - an actuary in relation to either or both of the following:
 - a defined benefit superannuation scheme
 - an allocation from a reserve in a superannuation scheme other than a defined benefit superannuation scheme.

Summary

9. Whether a particular service falls within the definition of a tax agent service for the purposes of the TASA is a question of fact and will depend on the elements identified in this TPB(I). For the service to be a tax agent service, it must satisfy either Element 1 or Element 2 (or both) and satisfy Element 3.
10. A list of indicative tax agent services can be found in **Appendix A – Examples of tax agent services**.

⁵ For further information, refer to the definition of 'related entity' in Regulation 13 of the TASR.

Appendix A

Examples of tax agent services

The following table contains a non-exhaustive list of the types of services commonly provided and whether they constitute a tax agent service.

| Service | | Tax agent service | Not a tax agent service |
|---------|---|-------------------|-------------------------|
| 1 | Preparing returns, notices, statements, applications or other documents about your client's liabilities, obligations or entitlements under a taxation law. | X | |
| 2 | Applying to the Commissioner or the Administrative Appeals Tribunal (AAT) for a review of, or instituting an appeal against, a decision on an objection under Part IVC of the <i>Taxation Administration Act 1953</i> (TAA). | X | |
| 3 | Lodging returns, notices, statements, applications or other documents about your client's liabilities, obligations or entitlements under a taxation law. | X | |
| 4 | Assisting clients with tax concessions for expenditure incurred on research and development activities where the service involves the application of taxation laws. | X | |
| 5 | Preparing depreciation schedules on the deductibility of capital expenditure. | X | |
| 6 | Ascertaining the withholding obligations for employees of your clients, including preparing income statements. | X | |
| 7 | Preparing or lodging objections on behalf of a taxpayer under Part IVC of the TAA against an assessment, determination, notice or decision under a taxation law. | X | |
| 8 | Giving clients advice about a taxation law that they can reasonably be expected to rely on to satisfy their taxation obligations. | X | |
| 9 | Providing tax related advice specific to client's circumstances regarding: PAYG withholding liability, Superannuation Guarantee obligations, fringe benefits tax laws, (if relating to collection and recovery only) and termination and redundancy payments. | X | |
| 10 | Advising about claiming of an allowable tax deduction for superannuation contribution under the ITAA 1997. | X | |

| Service | | Tax agent service | Not a tax agent service |
|---------|---|-------------------|-------------------------|
| 11 | Advising about superannuation contribution caps and the effect of exceeding those caps. | X | |
| 12 | Advising about fringe benefits tax laws. | X | |
| 13 | Undertaking a payroll compliance review, providing an assessment and/or opinion as to whether the client is compliant with their obligations under one or more taxation laws. | X | |
| 14 | Dealing with the Australian Taxation Office (ATO) on behalf of clients under a taxation law. | X | |
| 15 | Providing a payroll service which involves interpreting and applying a taxation law, including reporting of employee payroll information through the use of or set up of single touch payroll (STP) enabled software. | X | |
| 16 | Advising a client on the multinational anti-avoidance laws under the ITAA 1936. | X | |
| 17 | Advising on salary sacrificing arrangements and salary packaging. | X | |
| 18 | Applying to the Registrar for an ABN on behalf of a client. | X | |
| 19 | Advising a client on fuel tax credits. | X | |
| 20 | Advising, or acting on behalf of, clients on tax debts (i.e. payment plans, remission of debt or interest, winding-up matters initiated by the ATO). | X | |
| 21 | Installing computer accounting software and determining default goods and services tax (GST) and other codes tailored to clients. | X | |
| 22 | Reconciling BAS provision data entry to ascertain the figures to be included on a client's activity statement. | X | |
| 23 | Completing activity statements on behalf of a client or instructing them which figures to include. | X | |
| 24 | Confirming figures to be included on a client's activity statement. | X | |

| Service | | Tax agent service | Not a tax agent service |
|---------|---|-------------------|-------------------------|
| 25 | Coding transactions, tax invoices and transferring data onto a computer program for clients through processes that require the interpretation or application of a BAS provision. | X | |
| 26 | Providing advice about or confirming a client's withholding tax obligations in relation to the client's employees. | X | |
| 27 | Services declared to be a BAS service by way of a legislative instrument issued by the TPB. | X | |
| 28 | Preparing and providing an income statement that may include reportable fringe benefits amounts and the reportable employer superannuation contributions. | X | |
| 29 | Registering or providing advice on registration for GST, PAYG withholding, or FBT. | X | |
| 30 | Services under the <i>Superannuation Guarantee (Administration) Act 1992</i> to the extent that they relate to a payroll function or payments to contractors. | X | |
| 31 | Advising about a superannuation guarantee charge (SGC) liability, including calculating the liability and preparing the SGC statement. | X | |
| 32 | Advising about the offsetting of late payments of superannuation contributions against the SGC. | X | |
| 33 | Completing the late payment offset election section of an SGC statement. | X | |
| 34 | Representing a client in their dealings with the ATO relating to the SGC – lodging SGC statements, being an authorised contact relating to the superannuation guarantee (SG) and SGC, and accessing these accounts in the ATO's online services for BAS agents. | X | |
| 35 | Being an authorised contact with the ATO for payment arrangements relating to SGC account. | X | |
| 36 | Being an authorised contact with the ATO for requesting penalty remissions relating to SGC. | X | |

| Service | | Tax agent service | Not a tax agent service |
|---------|---|-------------------|-------------------------|
| 37 | Being an authorised contact for any audit or review activity undertaken by the ATO relating to SGC. | X | |
| 38 | Determining and reporting the superannuation guarantee shortfall and associated administrative fees. | X | |
| 39 | Dealing with superannuation payments made through a clearing house. | X | |
| 40 | Completing and lodging the Taxable payments annual report to the ATO on behalf of a client. | X | |
| 41 | Sending a TFN declaration to the ATO on behalf of a client. | X | |
| 42 | Undertaking a payroll compliance review, providing an assessment and/or opinion whether the client is compliant with one or more BAS provisions. | X | |
| 43 | Providing a payroll service which involves interpreting and applying a BAS provision, including reporting of employee payroll information through the use of or set up of STP enabled software. | X | |
| 44 | Installing computer accounting software without determining default GST and other codes tailored to the client. | | X |
| 45 | Providing non-tax advice relating to salary sacrificing arrangements and salary packaging. | | X |
| 46 | Transmission of data to the ATO through STP enabled software, where the data transmission does not require the interpretation or application of a taxation law or a BAS provision. | | X |
| 47 | Coding tax invoices and transferring data onto a computer program for clients under the instruction and supervision of a registered tax or BAS agent. | | X |
| 48 | Performing data entry for clients through processes that do not require the interpretation or application of a taxation law and/or BAS provision. | | X |
| Service | | Tax agent service | Not a tax agent service |

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| 49 | Contracting the services of a specialist to provide advice about an area of taxation law that you have no expertise and cannot review for accuracy. | | X |
| 50 | Services provided by an auditor of a self-managed superannuation fund under the <i>Superannuation Industry (Supervision) Act 1993</i> . | | X |
| 51 | Providing general taxation advice to clients that does not involve the application or interpretation of a taxation law and/or BAS provision to the client's personal circumstances. | | X |
| 52 | General training (such as a classroom) in relation to the use of computerised accounting software not related to particular situations. | | X |
| 53 | Performing bank reconciliations. | | X |
| 54 | Entering data without involvement in or calculation of figures to be included on a client's activity statement. | | X |