What is a tax (financial) advice service? March 2014

If you provide personal advice you are likely to provide your client with advice which interprets and applies the tax laws, even though this may not be the primary reason for the advice. Where your advice provides strategies which involve understanding and applying the tax laws you are likely to be caught under the TASA regime.

To assist you in determining if you provide a tax (financial) advice service and therefore whether you need to comply with TASA, answer these simple questions.

Please note that tax laws include tax, superannuation and SMSF laws as these are all administered by the Commissioner of Taxation through the ATO.

What is NOT a tax (financial) advice service?
You are excluded from the requirements of the TASA regime if you only provide:

- Factual information about tax, superannuation or SMSF laws; or
- General advice about tax, superannuation or SMSF laws.
**Advice scenarios where a tax (financial) advice service is provided**

<table>
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<tr>
<th>Gearing /cashflow management</th>
<th>Angela and Adam are in their early 40s with 2 dependent children. They seek financial advice on accumulating wealth outside super. Their financial planner recommends to them a gearing strategy as a way to accumulate wealth over the longer term. As part of this recommendation, the financial planner must determine that Angela and Adam have the cashflow to afford the interest costs on borrowed funds. In doing so, the financial planner takes into account the potential tax deductibility of interest costs and the effects this has on their income tax position and their eligibility to family tax benefits. The financial planning advice on Angela and Adam’s tax position is aimed primarily at ensuring they have the cashflow to afford the recommended strategy.</th>
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| Transition to retirement | Caroline is age 55 with reasonable superannuation savings and a plan to retire from the workforce at age 62. She seeks financial planning advice on whether her super is sufficient to fund her retirement and ways in which it can be increased if necessary, without a reduction in her cashflow. Caroline’s financial planner recommends that she commence to draw a transition to retirement pension from her existing super, then salary sacrifice an amount to super so as to maintain her net income. As part of the recommendation, the financial planner:  
  - estimates Caroline’s current net income, and the amount of pension payment and salary sacrifice contribution needed to maintain it  
  - estimates Caroline’s increased retirement balance at age 62. The financial planning advice on Caroline’s tax position is aimed primarily at addressing Caroline’s requirement for a way to increase her super balance without reducing her cashflow. |
| Life, TPD and income protection insurance | David recognises the need for personal insurance protection and seeks financial planning advice on the amount and type of insurance cover he should take out. He is a member of a superannuation fund that offers a range of insurance cover but could also establish his own personal policies. He wants to maximise the benefits available while minimising the costs to him of the insurance. David’s financial planner reviews David’s assets and liabilities and recommends the amount of cover that he requires. The financial planner also compares for David the effects of taking out the cover in his own name through a personal policy and taking out the cover through his superannuation account. As part of this comparison, the financial planner takes into account the after-tax cost to David of his insurance premiums and any potential taxation on the benefits payable under the policies. The financial planning advice on David’s tax position is aimed primarily at illustrating which method of structuring his insurance provides him the greatest benefit at the lowest cost. |
| CGT liabilities on disposal of investments | Erica owns a portfolio of shares. She seeks financial advice on long-term wealth accumulation and an appropriate asset allocation. Erica’s financial planner assesses her risk profile and recommends an asset allocation that is consistent with that profile. As part of this process, the financial planner recommends that Erica sell some of her existing shares and use the proceeds for investment in managed funds to increase diversification of her investments. In recommending which shares Erica should sell, the financial planner takes into account not only meeting Erica’s asset allocation but also minimising any potential capital gains tax liability. The financial planning advice on Erica’s tax position is aimed primarily at ensuring that Erica can continue to accumulate wealth with investments that meet her risk profile. |
| Small business - Buy/Sell and Key Person insurance | Partners in a small business approach a financial planner (specialising in risk advice) to set up Buy/Sell and key person insurance cover to fund succession planning and business risk mitigation strategies. The financial planner discusses the different forms of business ownership structures, and the taxation and other implications of Buy/Sell insurance under each business structure option. Such business ownership structures could include individual ownership, cross ownership, through superannuation, or under an insurance trust. Issues of deductibility of premiums, taxes on benefits and other taxation and business implications of key person revenue and capital protection are also discussed. The financial planning advice on the business partners’ tax position is aimed primarily at addressing how they can best protect their business into the future. |
Scenarios where a tax (financial) advice service is NOT provided

Factual Information
A consumer is interested in setting up a term deposit bank account. The adviser confirms with the consumer that they only wish to transact, and shows the consumer a PDS. When the client asks if tax was payable on the interest, the adviser highlights that on page 5, the PDS mentions that depending on his personal circumstances he may have to pay income tax on any interest earned on amounts standing to the credit of his account. The consumer is recommended to seek independent external taxation advice in this regard. As this information is shown to the consumer in a PDS, and there is no application or interpretation of taxation laws to the consumer's personal circumstances, this is factual information.

General Advice
A client enquires about life risk insurance. The planner advises the client that there are a variety of life risk products available including life insurance, TPD, income protection, and explains the differences between such products, including the general tax obligations attached to each type of product. As the conversation was educational in context and the planner did not collect personal information to evaluate the client’s personal circumstances to apply or interpret taxation laws, this is general advice.

What is the difference between a tax (financial) advice service and a tax agent service?
A tax (financial) advice service is:
- provided in the context of the advice provided by financial planners under an AFSL; and
- the part of financial advice which interprets and applies the tax laws (including tax, super and SMSF laws) to the personal circumstances of the client.

A tax agent service is:
- generally provided by accountants who are registered tax agents;
- includes the assessment of the client's circumstances for the purpose of completing and filing tax returns on behalf of the client;
- clients can rely on this advice to claim entitlements from the ATO; and
- permits the provider of the advice to liaise with the ATO on behalf of their client in relation to assessments, determinations, notices or decisions under a tax law.

Tips
- If you provide any personal advice under an AFSL, for a fee, don’t get caught out. Assess now whether the advice service you provide falls under the definition of a tax (financial) advice service.
- Understand your registration options and requirements – (See When do I need to register with the TPB? (transition arrangements) fact sheet.)
- Discuss registration options with your licensee.
- Understand your compliance obligations - See TASA Code and other compliance requirements fact sheet:
  - You must comply with the TASA Code and other ongoing compliance requirements as soon as you are registered with the TPB - To ensure you do not inadvertently breach these requirements, ensure you comply with the requirements prior registering with the TPB.
- Change the TASA disclaimer in your SOA – from 1 July 2014 you must use a new disclaimer in your SOAs until you are deemed registered with the TPB. (See When do I need to register with the TPB? (transition arrangements) fact sheet for details)
- Consider your client disclosures to ensure your clients clearly understand the purpose of the tax advice you provide. Highlight to your client that the advice you are providing:
  - is to ensure your client understands the tax implications of the financial strategies you have proposed in your financial plan
  - is not for the purposes of doing tax returns. Tax advice for the purposes of tax returns, must be sought from a registered tax agent such as an accountant
  - an explanation of the difference between a registered tax (financial) adviser and a tax agent.
The following table contains a non-exhaustive list of the types of advice services and whether they fall under the definition of a tax (financial) advice service or a tax agent service. (Source: TPB)

<table>
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<tr>
<th>SERVICE</th>
<th>TAX (FINANCIAL) ADVICE SERVICE</th>
<th>TAX AGENT SERVICE</th>
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<tbody>
<tr>
<td>1. Any service specified by the TPB by legislative instrument to be a tax (financial) advice service.</td>
<td>Yes</td>
<td>Yes</td>
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<td>2. Personal advice (as defined in the Corporations Act 2001), including scaled advice and intra-fund advice, which involves the application or interpretation of the taxation laws to a client's personal circumstances and it is reasonable for the client to expect to rely on the advice for tax purposes.</td>
<td>Yes</td>
<td>Yes</td>
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<td>3. Any advice (other than a financial product advice as defined in the Corporations Act 2001) that is provided in the course of giving advice of a kind usually given by a financial services licensee or a representative of a financial services licensee that involves application or interpretation of the taxation laws to the client's personal circumstances, and it reasonable for the client to expect to rely on the advice for tax purposes.</td>
<td>Yes</td>
<td>Yes</td>
</tr>
</tbody>
</table>
| 4. Factual tax information which does not involve the application or interpretation of the taxation laws to the client’s personal circumstances. Such information could be included in, but is not limited to:  
  - regulated disclosures such as product disclosure statements and financial services guides;  
  - other products such as general marketing and promotional materials. | No                              | No                |
| 5. Client tax-related factual information. Such information includes, but is not limited to:  
  - payments summaries;  
  - other documents such as annual summary of interest paid and account statements. | No                              | No                |
| 6. General advice (as defined in the Corporations Act 2001).          | No                              | No                |
| 7. Any service that does not take into account an entity's relevant circumstances so that it is not reasonable for the entity to expect to rely on it for tax purposes (this includes simple online calculators as defined in ASIC’s Class Order (CO 05/1122). | No                              | No                |
| 8. Factual information provided by call centres and front line staff and specialists that would not be expected be relied upon for tax related purposes. | No                              | No                |
| 9. Preparing a return or a statement in the nature of a return (to provide this service would require registration as a tax agent) | No                              | Yes               |
| 10. Preparing an objection under Part IVC of the Taxation Administration Act 1953 against an assessment, determination, notice or decision under a taxation law (to provide this service would require registration as a tax agent). | No                              | Yes               |
| 11. A service specified not to be a tax agent service in Regulation 13 of the Tax Agent Services Regulations 2009. | No                              | No                |
| 12. Dealing with the Commissioner on behalf of a client (to provide this service would require registration as a tax agent). | No                              | Yes               |
**Legal Definition**

A 'tax (financial) advice service' is defined in section 90-15 of the Tax Agent Services Act 2009 (TASA) as follows:

1. A tax (financial) advice service is a tax agent service (other than within the meaning of subparagraph (1)(a)(iii) of the definition of that expression) provided by a financial services licensee or a representative of a financial services licensee in the course of giving advice of a kind usually given by a financial services licensee or a representative of a financial services licensee to the extent that:
   a. the service 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; and
   b. the service 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; or
      ii. to claim entitlements that arise, or could arise, under a taxation law.

2. The Board may, by legislative instrument, specify that another service is a tax (financial) advice service.

3. However, a service is not a tax (financial) advice service if:
   a. it consists of preparing a return or a statement in the nature of a return; or
   b. it is specified in the regulations for the purposes of this paragraph.

Please note that tax laws include superannuation laws as these are administered by the Commissioner of Taxation.

**TPB view of what is a tax (financial) advice service**

The TPB views a tax (financial) advice service as having five key elements.

![Diagram showing the five key elements of a tax (financial) advice service](image)

Importantly, the TPB does not differentiate between 'financial product advice' or 'dealing in a financial product' as defined in the Corporations Act 2001. This means that the TPB believes a tax (financial) advice service could be given:

- as part of a strategic discussion about a client's long-term financial objectives;
- in the course of advising a client about the relative merits of particular financial products or other investments; or
- in the course of advising a client about non-financial products such as real property.

Disclaimer: The views expressed in this document are indicative only and do not take account of your personal circumstances. In addition, these views are not in any way binding on the registration authority, the Tax Practitioners Board (TPB). The FPA strongly recommends that all outstanding issues in relation to registration and other such matters be resolved directly with the TPB. The regulations in relation to tax (financial) advice services have not been finalised by Government.