



Tax Insights

Can you identify your Reportable Tax Positions?

Snapshot

Reportable Tax Positions (RTPs), and the requirement to lodge an RTP schedule, have been in place since 2011. However, the RTP disclosure requirement has been significantly broadened for income years ending on or after 30 June 2018 to include all companies in economic groups with a turnover greater than AUD 250 million (where notified by the Australian Taxation Office (ATO)). It is expected that the RTP regime will cover approximately 1,100 taxpayers.

Overview of RTP Categories

RTPs fall into three categories (A, B and C) and the disclosure required on the RTP schedule is different for each category.

Category	Materiality application
A Category A RTP is a position where it would be concluded in the circumstances, having regard to relevant authorities, that what is argued for is about as likely to be correct as incorrect, or is less likely to be correct than incorrect.	Yes
A Category B RTP is a material position in respect of which uncertainty about taxes payable or recoverable is recognised and/or disclosed in the taxpayer's financial statements or a related party's financial statements.	Yes
A Category C RTP is a reportable arrangement expressly listed by the ATO.	No – unless specified by the particular reportable arrangement

The RTP Schedule can be seen as a part of the ATO's Justified Trust approach, which the ATO describes as including seeking "objective evidence that would lead a reasonable person to conclude a particular taxpayer paid the right amount of tax."

Where does the RTP Schedule fit in?

The ATO has made significant changes to the ways that it interacts with, and its expectations of, Australia's largest taxpayers. The RTP Schedule can be seen as a part of the ATO's Justified Trust approach, which the ATO describes as including seeking "objective evidence that would lead a reasonable person to conclude a particular taxpayer paid the right amount of tax. This is a higher level of assurance than confirming certain risks do not arise".

The ATO has wide powers to require taxpayers to lodge annual income tax returns, as well as further returns and information. In addition, a document will only be taken to be lodged in the approved form, if (amongst other requirements), "it contains the information that the form requires".

The powers of the ATO are supported by a range of penalties, for example, for false or misleading statements as well as failure to lodge an "approved form" by the due date.

Further, when the ATO has been notifying taxpayers in respect of a requirement to lodge the RTP schedule, the ATO has stated that "Your income tax return lodgment obligations will not be complete until you lodge your RTP schedule". In the same way as an income tax return, the Public Officer is required to declare that the information on the RTP schedule is true and correct.

Accordingly, the completion of the RTP schedule, and the governance and review process relating to the RTP schedule, needs to be shaped having regard to the ATO Justified Trust approach and the penalties for non-compliance.

The RTP schedule is a noticeably short document. It can only be understood with reference to guidance issued by the ATO on its website entitled "Guide to reportable tax positions 2018" (Guide). This Guide was last updated on 2 July 2018.

The Guide states that "you should use this guide if we have notified you in writing that you must lodge the RTP schedule 2018". In order to provide the information that the form requires, and so lodge a RTP schedule in the approved form, taxpayers need to understand, interpret and apply the ATO instructions and commentary in its Guide.

Observations on the RTP Schedule

Materiality

For Category A and B RTPs, the materiality threshold is 5% of the company's Australian current income tax expense, calculated in accordance with accounting principles (generally, Australian Accounting Standards).

Where 5% of the Australian current tax expense exceeds AUD 30 million (i.e. current tax expense is greater than \$600 million) the materiality threshold is AUD 30 million. Where 5% of the Australian current tax expense is less than AUD 3 million, or there is no Australian current tax expense, the materiality threshold is AUD 3 million.

The materiality threshold is applied to the "potential adjustment" associated with the relevant tax position, should that position not be sustained. Generally, this would be the corporate tax rate applied to the (potential) increase in assessable income, decrease in deduction (including tax losses recouped) and decrease in a capital loss available, the (potential) denial amount for foreign income tax offsets and/or other tax offsets.

Disclosure Requirements

For Category A and B positions, the RTP schedule broadly requires a summary of the relevant facts giving rise to the position (circumstances, arrangements, transactions) and a summary of the position taken in the income tax return (including relevant authorities and practices).

A Category C position must be disclosed where a taxpayer's position shares similar characteristics to any of the arrangements targeted by a set of questions produced by the ATO, which are expected to evolve over time.

In this regard, the ATO Guide says that questions relating to arrangements outlined in Taxpayer Alerts should be "**interpreted widely**" and disclosure is required where the arrangement is a **type of arrangement or variation of an arrangement** described in the Taxpayer Alert. This means **you still need to make a disclosure where:**

- Some features of your arrangement are different to the features described in the examples in the Taxpayer Alert
- Your arrangement does not contain all features of the arrangement described in the Taxpayer Alert
- You do not view the arrangement to be aggressive, inappropriate, contrived artificial
- You do not consider a tax benefit arose from the arrangement
- There is an observable third-party market or long-standing practice for this arrangement."

The ATO Guide says that questions relating to arrangements outlined in Taxpayer Alerts should be "**interpreted widely**" and disclosure is required where the arrangement is a **type of arrangement or variation of an arrangement** described in the Taxpayer Alert.

Exclusions

Broadly, you may not need to disclose an RTP if:

- You have applied for a private ruling that covers the RTP;
- The RTP is covered by an advance pricing arrangement (APA) or there is in place an application for an APA that has been accepted into the APA program; and/or
- It relates to a Category B position where the same position and/or contingent liability (asset) has been disclosed in a prior year RTP Schedule and the amount has not increased since that disclosure.

Penalties

Significant penalties can apply to RTP reporting. There is a failure to lodge (FTL) penalty if taxpayers fail to submit the RTP schedule on time and in the "approved form". The FTL penalties can be significant, particularly if taxpayers are a Significant Global Entity (SGE) where the penalty is AUD 105,000 for each 28 days a lodgement is overdue, for up to five months.

Additionally, false or misleading statements in the RTP schedule could give rise to penalties under subsection 284-90(1) of the *Taxation Administration Act 1953* (1953 Act). Again, these are higher for SGEs.

Not just another tax return schedule

The RTP schedule is part of the ATO's efforts to better understand the Australian tax base. Through completing the RTP schedule, taxpayers will effectively be providing the ATO with a comprehensive "tax roadmap" of their transactions and specified high risk arrangements. It therefore should not be seen as just a tax compliance obligation, but should be considered to be an important element of a company's tax risk governance framework.

In addition, there are numerous complex technical and practical issues that need to be considered when determining whether an RTP may exist. Some of these issues include:

How strong is your reasonably arguable position (RAP)?

It is possible for a position to be a RAP and yet still be required to be disclosed as a Category A RTP.

A matter is reasonably arguable if it would be concluded in the circumstances, having regard to relevant authorities, that what is argued for is about as likely to be correct as incorrect, or is more likely to be correct than incorrect (section 284-15 of the 1953 Act).

If a matter is **more likely** to be correct than incorrect, it should not fall within the scope of a Category A RTP. However, a material matter which is **about as likely** to be correct as incorrect (and which constitutes a reasonably arguable position) will fall within the scope of a Category A RTP.

Transfer pricing – more than just transfer pricing compliant documentation

The ATO Guide states that you must report a transfer pricing position in Category A on the RTP schedule where it stems from related party dealings not covered by section 284-255 (of the 1953 Act) compliant transfer pricing documentation. This is because there is insufficient information to determine if it is more likely to be correct than incorrect.

Through completing the RTP schedule, taxpayers will effectively be providing the ATO with a comprehensive "tax roadmap" of their transactions and specified high-risk arrangements.

The RTP Guide also states that your documentation must include assurance, from an appropriately experienced professional, that the position taken is reasonably arguable.

Even if your related party dealings are covered by compliant transfer pricing documentation, you may be required to disclose your transfer pricing position as a Category A or Category B RTP in certain circumstances.

In addition, determining **whether a transfer pricing related RTP position is material** is another process in itself and may require consideration of:

If your dealings are covered by compliant transfer pricing documentation

- The difference in the tax you would have paid if your transfer price was based on the median of the arm's length range and the actual tax paid.

If your dealings are not covered by compliant transfer pricing documentation

- By applying the relevant accounting standards to quantify the uncertainty; or
- Calculating the difference in the tax you would have paid if you used a transfer price based on the **arm's length price** and the tax you actually paid.

The arm's length price calculation will generally require consideration of the benchmarks listed in Practical Compliance Guide *PCG 2017/2 Simplified Transfer Pricing Record Keeping Options* (if you meet the relevant requirements) or a conservative approach (generally the gross value of the income or expense).

Category C questions – extensive and to be interpreted widely

You must disclose a Category C RTP if you answer "yes" to any of the questions covered by Category C. RTP Category C questions will be continuously updated by the ATO.

Category C covers a range of matters including financing and thin capitalisation, dividend payments, cross border transactions involving procurement or marketing hubs, research & development activities, tax consolidation, permanent establishments etc.

Category C currently requires consideration of 19 different Tax Determinations, Taxpayer Alerts or Practical Compliance Guides to determine whether you may have a RTP. In addition, some very common transactions, such as a cross border loans will often be an RTP and will also require further analysis and disclosure of self-assessed outcomes under PCG 2017/4.

Further, the final Category C question asks about all "Unamended mistakes or omissions within the last 4 years".

Even if your related party dealings are covered by compliant transfer pricing documentation, you may be required to disclose your transfer pricing position as a Category A or Category B RTP in certain circumstances.

Take the complexity out of identifying your RTPs

RTP Identifier

The RTP Schedule submission process can be extensive, time consuming and arduous.

In an interactive workshop using our unique RTP identifier tool, Deloitte can guide you through the extensive RTP Schedule reporting process and identify its specific application to your business. We can provide insights into your current and future tax risk and opportunities, giving you control over your reporting requirements and supporting your tax risk governance strategy.

Through the RTP Identifier workshop you can:

- Identify possible RTPs
- Provide insights for your Board and your business stakeholders on current and future tax positions
- Enhance your tax governance strategy
- Gain knowledge related to key ATO focus areas
- Streamline your year-end statutory audit process (in supporting tax balances and related disclosures)
- Obtain a proactive and holistic view of your current tax positions within the changing Australian tax landscape
- Document a process of addressing the analysis and completion of the RTP Schedule.

Tax Governance Framework

Companies required to lodge an RTP Schedule should also be subject to the ATO's Justified Trust approach. The ATO has published a very detailed list of Board and Managerial-Level Controls (in the 'ATO Tax risk management and governance review guide') that it expects organisations to implement. Furthermore, if your governance has not yet been reviewed by the ATO, it will be by 2020.

Many of the controls set out in the ATO guide are relevant to the RTP process. For example:

- Is your Board regularly briefed on tax risks and compliance requirements?
- Is there a process to identify significant transactions and to determine which transactions need external advice and Board approval?
- Are the tax return preparation and review processes clearly documented?
- Are key tax controls regularly tested by an independent party?

An RTP Identifier workshop is an excellent opportunity to consider these questions and commence a review of your broader tax governance framework.

For more information, please contact one of the following listed contacts.

Appendix 1: Category C matters

	Matter relates to	ATO guidance, if relevant
1	Sections 25-90, section 23AH, subdivision 768-A	TD 2016/6
2	Special dividend or share buyback funded through an equity raising	TA 2015/2
3	Offshore procurement hubs	TA 2015/5
4	Thin capitalisation: valuations of internally generated intangible assets or other intangible assets	TA 2016/1
5	Removed	
6	Related party foreign currency denominated finance with cross currency interest rate swaps	TA 2016/3
7	Cross-border leasing of mobile assets with interposed entity between foreign owner and Australian operator	TA 2016/4
8	Australian tax consolidated group with offshore permanent establishment with expenses associated with an intra-Australian group transaction	TA 2016/7
9	Related party marketing hub (including PCG self-assessment)	PCG 2017/1
10	Thin capitalisation: a debt interest treated wholly or partly as equity for accounting purposes	TA 2016/9
11	Cross border round robin financing arrangement	TA 2016/10
12	Stapled structures where a corporate tax entity makes payments to a flow-through trust	TA 2017/1
13	R&D <ul style="list-style-type: none"> • construction activities • ordinary business activities • agricultural activities • software development activities • More than 1 of the above categories 	<ul style="list-style-type: none"> • TA 2017/2 • TA 2017/3 • TA 2017/4 • TA 2017/5
14	Cross-border related party debt funding (including PCG self-assessment)	PCG 2017/4
15	Exploration expenditure	PCG 2016/17
16	Tax consolidations and the churning rule	
17	Tax deductions for interest where withholding tax is not expected to be remitted in the next 18 months	
18	Section 25-90, section 23AI /23AK	TA 2009/9
19	Formal settlement or other form of agreement with the ATO	
20	Securities lending and derivative contracts where a party received franking credits	TA 2018/1
21	Unamended mistakes or omissions within the last 4 years	

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