MT 2008/1EC - Compendium

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Ruling Compendium – MT 2008/1

This is a compendium of responses to the issues raised by external parties to draft MT 2008/D1 – Penalty relating to statements: meaning of reasonable care, recklessness and intentional disregard

This compendium of comments has been edited to maintain the anonymity of entities that commented on the draft ruling.

Summary of issues raised and responses

Issue No.	Paragraph No. in Draft	Issue raised	Tax Office Response/Action taken (references to final ruling)
1.	39	It is acknowledged at paragraph 39 of MT 2008/D1 that the reasonably arguable position test imposes a higher standard than that required to demonstrate reasonable care. It is submitted that the ruling should clarify that the Commissioner will not seek to argue a lack of reasonable care in relation to the application of a taxation law where a reasonably arguable position has been adopted.	Change accommodated. The reasonable care test and the reasonably arguable position (RAP) test are independent and separate tests. Since the test for having a RAP is purely objective, it does not depend on the actions of the entity. However, in the usual case, the situation will be that a RAP is reached only as a consequence of having exercised reasonable care to arrive at the correct taxation treatment. The following words inserted after paragraph 40 acknowledge this practical reality: Although demonstrating a reasonably arguable position involves the application of a purely objective test, an entity will usually reach their position (at the time of making the statement) as a result of researching and considering the relevant authorities. In these circumstances, the efforts made by the entity to arrive at the correct taxation treatment will also demonstrate that reasonable care has been shown.

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2.	64	The wording in paragraph 64 implicitly overstates the importance of applying for a private ruling in achieving the reasonable care threshold. It is submitted that the words 'failing to do so does not inevitably lead to a failure to take reasonable care' should be substituted with 'in some situations, failing to apply for a private ruling or to pursue other channels, such as obtaining appropriate advice from a qualified advisor, may lead to a failure to take reasonable care'.	Change accommodated. The word 'inevitably' has been deleted and replaced with 'necessarily' to respond to the concern that the importance of applying for a private ruling has been overstated. The further change in expression suggested in the comment is not necessary as the same idea is expressed in paragraph 60. It states that where an entity is uncertain about the correct tax treatment, reasonable care requires appropriate enquires to be made – including contacting the Tax Office, consulting a Tax Office publication or other authoritative statement, or getting professional advice. Paragraph 66 covers the subject of private rulings and the discussion about the different options available to an entity to arrive at the correct tax treatment is more appropriately dealt with in paragraph 60 rather than in paragraph 66.
3.		It is suggested that a further example should be included after example 7 of MT 2008/D1, covering the position where an individual obtains a tax statement from a third party, which is reasonable on its face, relied upon but proves to be incorrect. This may include a statement from the bank about annual interest on an account, a trust distribution statement or some other similar statement.	No change. The suggested example is already covered in paragraph 80 to highlight that whether reliance on incorrect information provided by a third party shows a failure to take reasonable care will depend on an examination of all the circumstances. Paragraph 80 says: > Where, for example, an entity returns interest income based on incorrect information provided by the particular financial institution, there will not be a failure to take reasonable care unless the entity knew or could reasonable be expected to know that the statement was wrong. This expresses the same idea as the suggested example by demonstrating that reliance on information which is incorrect – but which is reasonable on its face – does not show a failure to exercise reasonable care.

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4.		It is suggested that some examples be included in relation to situations where the Commissioner considers that there might be recklessness or intentional disregard.	No change. The meaning of recklessness and intentional disregard has been explained by reference to decided cases and the particular facts of those cases that supported a judicial finding of recklessness or intentional disregard. The principles are illustrated by the case law and including extra examples will not add value to the explanation of what the terms mean.
5.	40	There seems to be an inconsistency between paragraph 40 (i.e. no presumption of a lack of reasonable care just because there is a tax shortfall) and what almost invariably seems to happen in practice – i.e. that the ATO automatically imposes a penalty if there is a shortfall amount(s). The ATO needs to stress in the Ruling and any Practice Statements that officers must have a reasonable case before imposing penalties	No change. The Tax Office acknowledges this concern. Paragraph 42 makes it clear that there is no presumption that a shortfall amount points to a failure to take reasonable care. It explains that there must be evidence to support the conclusion that the standard of care shown falls short of what would be reasonably expected in the circumstances.

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6.	37	The ruling states that it is only a failure to take reasonable care to comply with a taxation law that gives rise to an administrative penalty and that the penalty regime therefore does not apply to a failure to take reasonable care to comply with obligations under laws that are not taxation laws. In the customs environment, a taxpayer or their agent (for example, a customs broker) may incorrectly state the tariff classification of the goods on an import declaration. This results in a difference in the amount of customs duty that is payable and consequently the value of the taxable importation is calculated incorrectly and a shortfall of goods and services tax (GST) results. The behaviour (for example, failure to take reasonable care) is associated with the statement of the tariff classification (not an obligation under a taxation law) and then impacts on the value of the taxable importation as defined in section 13-20 of *A New Tax System (Goods and Services Tax) Act 1999* (GST Act). Is this a close enough connection between the behaviour and a taxation law?	No change. This situation concerns the making of a false statement about the value of a taxable importation under the GST Act that arises as a result of a failure to take reasonable care in making a statement about the correct tariff classification of the goods under a customs-related law. If a shortfall amount arises as a result of the statement there will be a liability to an administrative penalty. The failure to take reasonable care in relation to the tariff classification statement that results in a false statement of the value of the taxable importation under subsection 13-20(2) of the GST Act also constitutes behaviour that shows a failure to take reasonable care to comply with a taxation law as defined.

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7.		The examples given regarding the circumstances of ill health and the potential to compromise a person's capacity to comply with their taxation obligations seems more relevant to taxation obligations that occur over a period of time and appear to be more relevant to personal rather than business obligations. Guidance on the relevance of personal circumstances such as ill health would be beneficial for situations where the false or misleading statement relates to a taxable importation (an event, rather than period) and where a business is involved rather than an individual. That is, what would be the impact of personal circumstances of an individual when that individual acts on behalf of a business?	No change. Paragraphs 44 to 51 are designed to illustrate the principle that individual circumstances can affect a person's capacity to comply with their taxation obligations. The expression 'complies with their tax obligations' is apt to apply to all obligations arising under a taxation law – not just those in a non business context. The behaviour that attracts penalty under subsection 284-75(1) is the failure to take reasonable care in making a statement that results in a shortfall amount. There will be a shortfall amount if your tax related liability for a taxable importation worked out on the basis of the statement is less than it would be if the statement were not false or misleading. The importation is an event – but it is the statement giving rise to the shortfall amount that potentially gives rise to an administrative penalty.

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			The individual circumstances of the statement maker are a relevant consideration to the extent that they impair or compromise their capacity to comply with their tax obligations. Certainly, the application of the principle is more readily apparent in the case of an individual who is attending to their personal taxation obligations as the first example shows. However, the principle also has wider application to statements made by a non natural entity such as a company which can only act through its employees or agents. In the context of a business, all of the attributes of the business will need to be considered – such as the size and nature of the business, to determine whether a statement made by an employee or an agent of the business shows a failure to take reasonable care. The temporary incapacity of an employee that an employer has no knowledge of may well affect the entity's capacity to comply with its taxation obligations. However, whether reasonable care has been shown in making a false statement will depend on all of the circumstances. For example, if the employer knew of an employee's incapacity or ought to have known of the incapacity but did nothing to resolve the situation then reasonable care is not likely to be shown. It is impossible to be prescriptive about the impact of personal circumstances in every case. The important point is that it is a relevant factor that has the potential to affect the standard of care that is reasonable in a particular case.

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8.	51	The ruling states that a professional person with specialist tax knowledge will be subject to a higher standard of care that reflects the level of knowledge and experience a reasonable person in their circumstances will possess. Is a customs broker a professional person with specialist tax knowledge? A customs broker is required to have some knowledge of taxation law to enable the goods to be entered correctly – for example, luxury car tax threshold, GST exceptions. However, is this sufficient to be considered specialist tax knowledge? As noted above, the circumstances that result in shortfall amounts of GST generally relate to incorrect information such as tariff classifications, customs value and tariff concessions – these are not tax matters but impact on the value of taxable importation. It would be considered that a customs broker is a professional person with specialist customs knowledge. Should the position that a higher standard of care apply equally to customs brokers?	No change. Paragraphs 52 to 57 discuss the potential impact of personal attributes such as knowledge, education, experience and skill on the level of care that is reasonable when making statements to the Commissioner or to an entity exercising powers under a taxation law. Specifically, paragraph 53 notes that someone who has specialist tax knowledge will be exposed to an appropriate standard of care that reflects the knowledge and experience someone in their circumstances will possess. If a customs broker makes a statement that is false and that results in a shortfall amount, an administrative penalty is imposed if there has been a failure to take reasonable care. A customs broker will have specialist knowledge that relates to their area of expertise. Customs brokers are licensed under the *Customs Act 1901* and will hold appropriate qualifications. That specialist knowledge (as noted in the comment) will include specific aspects of the GST law relating to the GST implications of the importation of goods. In determining whether a customs broker has breached the standard of reasonable care in making a false statement, the benchmark is the level of care that would be expected of an ordinary competent customs broker who practices in the same field and who has the same level of expertise. To this extent the level of care a customs broker is required to demonstrate is clearly higher than that of someone who does not possess this level of specialist knowledge.

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9.	56	What is a new entrant? Is a new entrant someone completely new to the tax system or does it include a business where one of the directors or partners may have experience in the tax system but the inexperienced director or partner is responsible for taxation related matters?	No change. The discussion of new entrants to the tax system at paragraph 58 is merely intended to show that just as someone with specialist knowledge and experience will be subject to an appropriately higher standard of care, someone who is new to the tax system and therefore inexperienced will be subject to an appropriately lower standard of care. We do not think this principle would apply to reduce the standard of care that is appropriate for a corporate entity to take account of the inexperience of one of its directors. The corporate entity itself is not a new entrant to the tax system and satisfying a minimum standard of reasonable care would at least require that the personnel responsible for taxation reporting are qualified and competent.
10.	58	The ruling states that if an entity is uncertain about the correct tax treatment of an item, reasonable care requires the entity to make appropriate enquiries to arrive at the correct taxation treatment which include contacting the Tax Office, referring to a Tax Office publication or other authoritative statement or seeking advice from a tax agent. In the customs environment, seeking advice from a valuer to determine the customs value of a car may be considered reasonable care or seeking advice from Customs regarding the tariff classification. While a general principle is given, further clarity in terms of customs related matters would be useful.	Change accommodated. The following has been added to paragraph 60 to clarify: The type of enquiry or request for advice that is appropriate will depend on the circumstances. For example, in the context of determining the value of a taxable importation for GST purposes, it may be appropriate to obtain an expert valuation or to seek advice from the Australian Customs Service in order to demonstrate reasonable care.

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11.	78-82	A common situation in the customs environment is where goods in addition to those the taxpayer may have ordered arrive but the entry only stated the goods the person ordered and based on the invoice provided by the supplier. Would it be possible to include an example to address this situation?	No change. Where a statement relies on information contained in a document such as an invoice, purchase order or contract of sale, and the statement maker does not know and could not reasonably be expected to know that the information is incorrect, then this is consistent with the taking of reasonable care. This point is made at paragraph 80. When the statement is made before the goods have arrived in the country it is likely that the owner or their agent is not able to do anything more to verify the accuracy of the information because the goods aren't physically available to be checked against the documentation. When the statement is made after the goods have arrived, the mere possibility that the invoice or other document could be incorrect does not mean that an importer must extensively audit the goods to ensure that the declaration is correct. However, if the circumstances showed that invoices issued by a particular supplier were consistently inaccurate, then some form of sample checking by the owner or agent would be appropriate in order to demonstrate reasonable care. Relying on the documentation alone in such a case would involve the taking of an unacceptable risk that the declaration might be wrong.

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12.	97-106 107-114	The ruling does not include examples other than case law. In the customs environment a person may rely on an outdated version of a customs manual to support a position taken to determine the customs value of the goods. The person is advised that the version has been replaced and is provided with the current version. Application of the current version results in a difference in the customs value and consequently affects the value of the taxable importation. The person continues to rely upon the outdated version of the customs manual. Would this be a suitable example for recklessness or would it meet the requirements of intentional disregard?	No change. If the facts establish that the entity knows the information they are relying on is out of date and is incorrect then the statement they make is knowingly false. This would support a finding of intentional disregard because there has been a deliberate choice to ignore the law. However, if the facts suggest that there may have been a genuine misunderstanding about the advice given but that greater care ought to have been taken in clarifying the correct position – a failure to take reasonable care only may be evidenced. All of the facts will need to be weighed in arriving at a decision about the behaviour that underlies the false statement.