MT 2008/2EC - Compendium

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Ruling Compendium – MT 2008/2

This is a compendium of responses to the issues raised by external parties to draft MT 2008/D2 – Shortfall penalties: administrative penalty for taking a position that is not reasonably arguable.

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.	Issue raised	Tax Office Response/Action taken (references to the final ruling)
Paragraph 29 in draft Ruling		
1.	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. This point should also be clarified in relation to paragraph 29 of MT 2008/D2.	Change accommodated. See paragraph 31. 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 acknowledge this practical situation: Although demonstrating a reasonably arguable position involves the application of a purely objective test, an entity will usually reach their position 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.
Paragraph 35 in draft Ruling		
2.	It is suggested that it be emphasised in MT 2000/D2 that, by definition, the question as to whether a position is 'reasonably arguable' will only initially arise where the ATO adopts a view that the position adopted is incorrect. As such, the fact that the position is incorrect is not of itself a factor in determining whether there is a reasonably arguable position.	Change accommodated. See point 5 at paragraph 37. Additional words added directly from *Walstern v. Federal Commissioner of Taxation* (2003) 138 FCR 1; 2003 ATC 5076; (2003) 54 ATR 423.. These words make it clear that the decision maker has adopted the view that the position taken is incorrect but that this in itself does not determine that there is no RAP.

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General		
3.	It is submitted that the ruling should acknowledge a 'reasonably arguable position' where there is a decision in favour of the taxpayer in the course of litigation, including for example a decision of a single judge at first instance or a dissenting judgment at a higher level.	No change made. Unnecessary to make any changes as the Ruling is clear in several places that relevant authorities for justifying a reasonably arguable position include decisions of court and tribunals (paragraph 41, dot point 3). Furthermore, paragraph 45 states that 'all authorities relevant to the tax treatment of an item, including the authorities contrary to the treatment, are taken into consideration in determining whether an entity has a reasonably arguable position'.
Paragraph 41 in draft Ruling		
4.	It is submitted that the words 'will not be fatal to' in paragraph 41 of MT 2008/D2 provide an unnecessarily negative connotation. We suggest that they be replaced with words such as 'will not prevent or be detrimental'.	Change accommodated. See paragraph 43. Replaced 'be fatal' with 'be detrimental'.
Paragraph 49 in draft Ruling		
5.	It is suggested that paragraph 49 should be recast in light of comments by the Joint Committee of Public Accounts and Audit (JCPAA) in Report 410 on the issue of 'reasonably arguable'. The JCPAA noted: 4.25 Section 284-15 defines a position as reasonably arguable when, having regard to the relevant authorities, it is 'about as likely to be correct as incorrect.' Without limitation, the relevant authorities are tax laws, statutory interpretation materials, court and AAT decisions, and public rulings. Some commentators have expressed concern that independent legal opinions are not relevant authorities. If the area is grey because there are no court decisions, then the concern is that a court will only examine the public ruling in determining whether a taxpayer has taken a reasonable position.	No change made. In the absence of judicial authority directly on point the Tax Office is unwilling to change its position regarding independent legal advices. The Ruling outlines many relevant authorities which can support a reasonably arguable position (for example see paragraphs 48 – 50). Furthermore, the Ruling does acknowledge that the authorities used to support the views expressed by the 'adviser' may indeed support the position taken by the entity. In this sense the Tax Office is not ignoring the relevance of independent advice. Also this position is already the Tax Office view, for example see paragraph 94 of Law Administration Practice Statement PS LA 2008/7 Application of the promoter penalty laws (Division 290 of Schedule 1 to the *Taxation Administration Act 1953*) to promotion of tax exploitation schemes.

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	4.26 The Federal Court examined this issue in Walstern v. FCT. The Court considered the previous section 222C of the Income Tax Assessment Act 1936, which is very similar to the new section under discussion. There, the ATO argued that legal opinions could not constitute relevant authorities. However, Justice Hill stated: It is true that opinions of counsel are not referred to in the definition of 'authority'. On the other hand it may be said that the definition is inclusory so that recourse to the opinions of counsel is not necessarily ruled out by the definition. It is unnecessary in the present case to decide this question, although I am inclined to think that the opinion of eminent counsel practising in the field,… if directed at the actual facts of a case, might well fall within the definition. 4.27 In other words, the list of authorities relevant to determining whether a taxpayer has taken a reasonably arguable position can include legal opinions. This is a fair approach. The ATO does not have a monopoly on legal tax advice. Taxpayers are entitled to approach private sector advisors as a means of demonstrating that they have acted reasonably. If they could not, this would be an unreasonable restriction on taxpayers' personal liberties. It would also potentially breach competition policy. 4.28 If a court were to subsequently rule that such opinions are not relevant authorities, then the Committee's view is that this matter should be corrected through legislation. The Committee also expects there would need to be exceptional circumstances for the ATO to challenge Justice Hill's comments.	

Issue No.	Issue raised	Tax Office Response/Action taken (references to the final ruling)
Paragraph 52 in draft Ruling		
6.	It is suggested to expand paragraph 52 of MT 2008/D2 to include the Commissioner's view as to whether, given the objective nature of the test, it is necessary for the taxpayer to have actually had regard to the relevant authorities, or whether it is merely necessary that they existed.	No change made. Paragraph 52 appears under the heading of 'Documenting a reasonably arguable position'. The paragraph is saying that if an entity does not have supporting documentation for a position they have taken, this factor is not necessarily detrimental as all relevant authorities (even contrary ones) will be considered.
Paragraph 69 in draft Ruling		
7.	It is suggested that the Commissioner include a comment after paragraph 69 that where there is an error of fact, it will be necessary to consider whether reasonable care has been taken	Change accommodated. Additional sentence added to paragraph 71.