TR 93/D23 - Income tax: tax shortfall penalties: guidelines for the exercise of the Commissioner's discretion to remit penalty otherwise attracted

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Australian Taxation Office

Draft Taxation Ruling

Income tax: tax shortfall penalties: guidelines for the exercise of the Commissioner's discretion to remit penalty otherwise attracted

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What this Ruling is about

1. This Ruling provides guidelines as to the manner in which the discretion contained in subsection 227(3) of the *Income Tax Assessment Act 1936* (ITAA) may be exercised to remit penalty otherwise payable under sections 226G, 226H, 226J, 226K, 226L and 226M (the shortfall sections) of the ITAA.

Ruling

2. The discretion to remit penalty otherwise attracted under a shortfall section should be exercised in only those exceptional cases where, having regard to all of the circumstances, the application of a particular shortfall section and/or the rate of penalty prescribed under that section would provide a clearly unreasonable or unjust result. However, the guidelines provided by this Ruling do not fetter authorised officers when exercising the discretion to remit. Each case should be decided on the basis of its own facts and circumstances.

3. The explanatory memorandum to the *Taxation Laws Amendment (Self Assessment) Act 1992*, which introduced the shortfall sections into the ITAA, lists three examples where it may be appropriate to remit the statutory penalties otherwise attracted (see pages 98 - 99 of the explanatory memorandum).

4. These are:

- where an authority that is material to whether a taxpayer's treatment of a matter is reasonably arguably correct is published immediately before the taxpayer lodges its return

of income, in circumstances where the taxpayer could not reasonably be expected to have been aware of the authority's existence;

- where a taxpayer, because of an extraordinary transaction, exceeds the threshold beyond which the reasonably arguable position test applies, and the circumstances of the case are such that it would be unjust to penalise the taxpayer solely by reason of failing that test;
- where the application of the special rules in respect of partners and trustees imposes an overly burdensome penalty on the defaulting partner or trustee.

5. Other cases where a remission, in whole or in part, may be appropriate are listed below. The list is not exhaustive, but it should be borne in mind that it will be in only exceptional cases where remission of the prescribed penalties will be warranted.

(i) Timing adjustments

6. In some cases a tax shortfall may represent an amount of tax deferred rather than an amount of tax permanently avoided. This would be the case, for example, where an amount of assessable income is included by a taxpayer in a year later than the year in which it was correctly assessable. Assuming that penalty is otherwise attracted, a partial remission of penalty may be warranted in these kinds of cases depending on the circumstances.

7. The case for remission is strongest where there is a one year only deferral of tax. This could be the case, for example, where an investor in a cash management trust returns a distribution from the trust in the year it is received rather than the previous year to which it relates. (Note that for the purposes of this example the taxpayer is assumed to have held an interest in the trust for only the one year, so that there is no question of successive deferrals). Assuming the taxpayer has behaved culpably in making the error, penalty is warranted, but it may be unfair to penalise the taxpayer at the same rate (say 25% for a lack of reasonable care) as another taxpayer who, through a breach of the same penalty standard, would have permanently avoided tax if undetected. The extent of the remission warranted would depend on the particular circumstances.

8. A factor that would influence the level of remission in such a case would be if, in addition to a deferral of tax, there has been an amount of tax avoided because of a reduction in the rates of the tax between the two years in question. In general, a remission of penalty in respect of that part of a tax shortfall that represents the amount of

tax that would have been permanently avoided because of the change of rates would not be warranted.

9. At the other end of the spectrum are cases where the taxpayer's treatment of an item in effect amounts to a permanent deferral of income, such as cases involving trading stock valuations, reserves and provisions. Such cases would not generally warrant concessional treatment, but would be subject to the normal rates of penalty prescribed in the shortfall sections.

(ii) Income disclosed in another taxpayer's return in the same year of income

10. Where, in the correct tax year, income of a taxpayer has been incorrectly included by another taxpayer, and in overall terms no tax has been avoided, for example, because the same rates of tax apply to the assessments in question, then any additional tax attracted because of the first taxpayer's tax shortfall should be fully remitted.

11. In similar circumstances, but where some tax has been avoided in overall terms, for example, because of differing tax rates between the two taxpayers, then any additional tax attracted should be remitted so that the penalty is effectively only imposed on the net tax avoided in overall terms.

(iii) Isolated arithmetic errors

12. A taxpayer who has made an arithmetic error in his or her return may be subject to penalty for a failure to take reasonable care, since most taxpayers could be reasonably expected to be able to accurately add up a column of figures.

13. However, there may be isolated cases where, having regard to the nature and size of the error, the taxpayer's record of complying with the tax laws, and other evidence which may indicate that the error had been made honestly or inadvertently, it would be appropriate to remit any penalty otherwise attracted. In such cases the penalty should ordinarily be remitted in full.

(iv) Voluntary disclosures made after a return is lodged but before due date for payment

14. Where a taxpayer, other than a relevant entity within the meaning of Division 1B of Part VI of the ITAA, makes a voluntary disclosure after the taxpayer has lodged a return for a year of income but before the due date specified in the taxpayer's original notice of assessment (or 30 days after the issue date of a notice in a refund or

non-taxable case), any penalty otherwise attracted under a shortfall section should be fully remitted. This recognises that in these cases effectively there is no avoidance or evasion of tax.

15. For taxpayers that are relevant entities, penalty otherwise attracted under a shortfall section in respect of a year of income will generally be remitted in full if the voluntary disclosure is made after the taxpayer's return for the year of income has been lodged and before the date on which the taxpayer's income tax becomes due and payable under section 221AM, or would have become due and payable if an amount of income tax was payable by the taxpayer. This effectively means that remission under this heading will only be available if a relevant entity lodges its return early. For example, a relevant entity that is due to make a final payment of tax on 15 March would need to both lodge its return *and* make the voluntary disclosure before that date in order to qualify for remission under this heading.

Date of effect

16. This Ruling (that is, the final Taxation Ruling based on this Draft Taxation Ruling) applies where the Commissioner's discretion under subsection 227(3) to remit penalty attracted under a shortfall section is exercised after the date on which this Ruling is issued.

Explanations

17. The shortfall sections provide for specific rates of penalty for breaches of certain set standards. This replaces the former system where penalty was attracted at a rate of 200% and remitted at the discretion of the Commissioner in virtually every case to provide a rate of penalty commensurate with the culpability of the taxpayer's behaviour (see Taxation Ruling IT 2517).

18. The new system specifies the penalties attracted for specific kinds of behaviour, and does not contemplate for most cases a further reduction from the rates set in the legislation. A major objective of the new penalties is to promote certainty in respect of the rates of penalty attracted and that objective would be compromised if the specified rates were regularly remitted.

19. However, the new system does recognise, through the remission power, that there will be certain exceptional cases where the penalty standards or the rates of penalty prescribed, if applied rigidly, may provide an unreasonable or unjust result. The discretion to remit penalties otherwise attracted should accordingly be administered in a

fashion which ensures that the objectives of the new penalty system are achieved, but without causing oppressive results.

20. While this Ruling provides guidelines as to when the discretion to remit penalties should be exercised, officers should treat each case individually and make a decision based on the merits of the particular case.

Commissioner of Taxation

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