TR 94/D30 - Fringe benefits tax: guidelines for the remission of penalty taxes arising from audit action

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This document has been finalised by TR 95/4.

Draft Taxation Ruling

Fringe benefits tax: guidelines for the remission of penalty taxes arising from audit action

other Rulings on this topic

IT 2141; TR 94/4

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What this Ruling is about

1. This Ruling sets out guidelines for the remission of additional tax under subsection 117(3) of the *Fringe Benefits Tax Assessment Act 1986* (the Act) arising from audit action, where an employer is liable for additional tax because:

- there has been a false or misleading statement (section 115 of the Act); or
- the employer has failed to furnish a return (section 114 of the Act).

2. The ruling also provides guidance for the remission of penalty for unpaid tax imposed by section 93 of the Act, where an amount of fringe benefits tax (FBT) arising out of audit action remains unpaid after the time when it became due and payable.

3. These guidelines are not intended to lay down conditions restricting an authorised officer from adopting the flexibility necessary to deal with each particular case on its merits. The comments in this Ruling do not replace an authorised officer's exercise of the Commissioner's discretion, but provide guidance in the sorts of factors that ought to be taken into account when making a responsible decision within the bounds of legal authority. Ultimately, the responsibility rests with the authorised officer to apply the law in a logical and consistent manner, in light of the facts and circumstances of each case.

Legislative Framework

4. Part VIII of the Act provides for the imposition and remission of additional (penalty) tax in certain circumstances.

5. Subsection 114(1) imposes additional tax equal to double the tax payable where an employer refuses or fails to furnish a return when and as required to do so under the Act.

6. Subsection 115(1) imposes additional tax equal to double the tax payable by an employer in respect of certain false or misleading statements. Additional tax is payable where, in connection with the operation of the Act, an employer:

- makes a statement to a taxation officer or to another person which is false or misleading in a material particular; or
- omits from a statement to a taxation officer or to another person something that renders it materially misleading,

and the tax properly payable by the employer exceeds the tax that would have been payable by the employer had the employer been assessed on the basis that the statement was not false or misleading.

7. Section 117 is concerned with the assessment of additional tax including the power to remit additional tax making up that assessment. Subsection 117(1) requires the Commissioner to make an assessment of the additional tax payable by an employer under a provision of Part VIII of the Act and serve written notice of the assessment. Subsection 117(3) allows the Commissioner either before or after making an assessment of additional tax, to remit the whole or any part of the additional tax payable by the employer.

8. Section 93 provides for the payment of additional tax by way of penalty for unpaid tax. It also includes the power to remit the additional tax imposed. Subsection 93(1) imposes an interest penalty if any amounts of tax remain unpaid after the time when it became due and payable. Subsection 93(4) allows the Commissioner in certain circumstances to remit in part or in whole the additional tax that would otherwise be imposed by subsection 93(1).

9. Section 90 specifies when tax assessed (including additional tax under Part VIII) becomes due and payable. Subsection 90(1) deems tax assessed to be due and payable 28 days after the end of the year of tax. The 'year of tax' ends on 31 March (subsection 136(1)). Subsection 90(2) provides that additional tax imposed under Part VIII is due and payable on the date specified in the notice of assessment of the additional tax. By virtue of section 92, the Commissioner may extend the time permitted for payment of FBT and additional tax.

Ruling

Additional tax for false or misleading statement

10. For subsection 115(1) to apply, an employer must have made a statement that is false or misleading in a material particular or omitted something from a statement that renders it misleading in a material particular and, in the result, there is or would have been underpayment of tax. Subsection 115(1) does not apply where a false or misleading statement does not affect the employer's assessed liability.

Remission of additional tax

11. When section 115 penalty is attracted, additional tax is payable at the rate of double the amount of tax avoided. However, the Commissioner will normally exercise the discretion available under subsection 117(3) to remit the additional tax to an amount that is considered reasonable given both the circumstances surrounding the making of the false or misleading statement and its consequences. In other words, as part of the remission process the authorised officer must consider both the intent of the false or misleading statement and its effect.

12. In deciding how much to remit, additional tax would usually be reduced to a figure made up of:

- **an interest equivalent** (compensating the revenue for the full amount of tax not having been paid by the due date); and
- **a culpability component** (calculated as a flat percentage of the tax avoided based on the person's blameworthiness).

13. It should be noted that under these guidelines additional tax by way of penalty tax under section 93 is remitted in full in cases where there is a false or misleading statement. The inclusion of an interest equivalent as part of the calculation of the appropriate section 115 penalty is considered to be a special circumstance for the purposes of paragraph 93(4)(c) of the Act.

Interest equivalent

14. In considering the consequences of the misleading statement and the resulting underpayment of FBT, it is relevant for the authorised officer to consider the overall effect on the revenue. This would include the time value of money so as to compensate the revenue for the tax being paid after the due date. For this purpose, the interest equivalent rate is the rate of interest payable under paragraph 170AA(4)(b) of the *Income Tax Assessment Act 1936* (ITAA).

15. Paragraph 170AA(4)(b) of the ITAA, as it applied to amendments to income tax assessments for years up to and including the 1991-92 year of income, adopted the interest rate applicable from time to time under the *Taxation (Interest on Overpayments) Act 1983*. For similar amendments for the 1992-93 year of income and all subsequent years, the rate specified in section 214A of the ITAA is adopted by paragraph 170AA(4)(b).

16. The above interest rates are adopted for FBT amended assessments. The table below summarises the interest rates to be used in determining the interest equivalent component of the additional tax for the specified years.

Years affected	Date interest rate first applies	Interest rate
1992 and earlier year amended assessments	1 July 1986	14.026%
	1 July 1992	10.0%
1993 and later year amended assessments	1 January 1993	9.6%
	1 July 1993	9.0%
	1 January 1994	8.7%

17. Interest is calculated from the 28th day of April following the end of the year of tax except where the employer has been granted an extension of time to lodge pursuant to section 68. In these cases the interest is to be calculated from the extended lodgment date when the return is lodged by that date. When the employer does not lodge by the extended lodgment date, interest is to be calculated from the 28th day of April.

18. In considering whether, or to what extent, the interest equivalent of the additional tax should be remitted, it is necessary to bear in mind the compensatory nature of this portion of the additional tax. So, a remission of the interest equivalent should not generally be available unless exceptional circumstances exist. Clerical or accounting error or ignorance of the obligations of the employer will not normally be considered as circumstances warranting remission. However, a partial or full remission may be appropriate where:

- the statement or omission has been made as a result of being genuinely misled by actions of the Australian Taxation Office (ATO), (full remission);
- the particular circumstances make it fair and reasonable to remit all or part of the interest. The degree of the remission, if any, is dependant on the facts of the particular case.

Culpability component

19. An intention to deceive is not a factor to be considered in the attraction of additional tax for a false or misleading statement, as section 115 operates automatically once such a statement has been made. On the other hand, matters such as intent, knowledge, care and honesty are relative concerns to be considered in any remission of additional tax. Employers who have deliberately made false statements in an attempt to avoid a known liability will be treated less favourably in relation to remission than employers who have made such statements honestly. Similarly, an employer who exercises a high degree of care in the discharge of their FBT obligations should be treated more favourably than those who act negligently or carelessly in the making of a statement. The degree of remission therefore relates to the culpability (or blameworthiness) of the employer.

20. The table below sets out a range of factors to be considered when determining the extent of an employer's culpability. Columns three and four list suggested rates of additional tax according to culpability. These typical rates do not take into account any mitigating or aggravating circumstances and assume a reasonable level of co-operation by the employer. A range is therefore available for each culpability type allowing the authorised officer to take into account the facts relating to each particular case.

CULPABILITY TYPE	DESCRIPTION	ADDITIONAL TAX (PER CENT)	
		1991 and earlier years	1992 and later years
Deliberate evasion	The making of a false or misleading statement knowingly or without belief in its truth with the intention to deceive the Commissioner so as to evade tax.	**45**	**75**
Recklessness (short of deliberate evasion)	The employer's statement, although neither known to be untrue nor dishonestly made, was made recklessly or rashly without any real basis in fact or consideration of the consequences. A finding of dishonesty is unnecessary.	**30 to 40**	**50**
Carelessness	A statement made as a result of negligence or thoughtlessness on the employer's part, producing a result which the employer could reasonably be expected to recognise as incorrect or at least subject to doubt. In this situation it would be expected the employer could satisfactorily explain the reason for the error or omission.	**15 to 30**	**20 to 30**
Carelessness of a minor nature	As for 'carelessness'; however the circumstances surrounding the error or omission are relatively less serious.	**5 to 15**	**5 to 20**

Non compliance with a public ruling or advance opinion

21. An employer's non compliance with a public ruling or with an unfavourable advance opinion would not normally, of itself, attract penalty for deliberate evasion where the employer honestly holds an alternative view and that view is based on sound arguments. Where a public ruling is available on a particular matter or an employer has received an advance opinion, the employer would generally be expected to follow it unless there are sound reasons for not doing so. The employer must consider the arguments raised by the public ruling or advance opinion and be able to demonstrate that the Commissioner's view does not apply to the particular circumstances at hand.

22. Failure to return in accordance with well established principles of the FBT legislation may well constitute deliberate evasion. Where the employer, without a valid reason, fails to follow an advance opinion or public ruling on a matter where the law is clearly established this action may be viewed as deliberate evasion. This would be the situation where the law which formed the basis of the Commissioner's view is clear, particularly if the circumstances indicate that the employer was aware of the correct position and intentionally chose to disregard it without a justifiable reason for doing so. That is, circumstances which indicated intentional dishonesty. If the employer honestly disagrees with the Commissioner's view but fails to consider the Commissioner's reasoning or is unable to form a reasonable argument to support an alternative view, the employer's actions may be seen as careless or even reckless. However, the employer would not be considered to be careless if he or she did not know and could not reasonably be expected to have known that the public ruling existed, for example, where an employer lodged a FBT return at about the same time a public ruling issued that materially affected the employer's return.

Information provided by an employee on a declaration

23. The situation could arise where an employer's false or misleading statement has been made on the basis of inaccurate information provided by an employee on a declaration. If the available evidence indicates that:

- the statement was made in good faith in discharging the obligations of the legislation; and
- there was not any collusion between the employer and the employee;

the understatement made by the employer will attract a nil culpability component. However, the interest equivalent may still be imposed under section 115.

24. Remission of the interest equivalent may also be appropriate where the declaration which includes the false or misleading statement has been made as a result of the employee being genuinely misled by actions of the ATO, or where the particular circumstances make it fair and reasonable to remit all or part of the interest.

25. The provision of a declaration by an employee to the employer is taken to be a statement made to a taxation officer by virtue of subsection 8J(10) of the *Taxation Administration Act 1953*. Prosecution action under that Act may be taken where a declaration provided to the employer is false or misleading in a material particular.

No culpability component to apply

26. Where, according to the law, a false or misleading statement or omission was made as a result of the employer either:

- being genuinely misled by actions of the ATO; or
- taking a position in regard to a genuinely contentious item, (see paragraphs 27 to 29);

the statement or omission would still attract the operation of section 115. However, in these circumstances the culpability component should be remitted in full.

Contentious items

27. A matter is considered contentious where the relevant tax law is unsettled or there is a serious question about the application of settled legal principles to the facts at hand. Arguments based on what is perceived to be sound business practice, adequacy of the evidence or inability to precisely determine adjustments are not considered contentious. In determining whether a matter is contentious it may be necessary to take into account relevant case law and precedent or matters currently under consideration by the courts. However, in so doing there is a danger that the employer will place too much reliance on decisions that are not relevant or only superficially relevant to the matter at issue. If on closer examination it is revealed that the decision is materially distinguishable on its facts or is otherwise inapplicable to the FBT benefit at issue then the matter cannot be considered contentious. In determining the importance of a legal precedent to the matter at issue, a decision that merely states a conclusion is ordinarily less persuasive than one that reaches its conclusion by constructive argument relating the applicable law to the pertinent facts. The conclusion of one decision is a matter to be weighed against all other relevant decisions. It will also be relevant, to consider the source of any legal precedent. For example, a High Court decision will be accorded more weight than a Federal Court decision, which in turn would be accorded more weight than a decision of the AAT.

28. The fringe benefits tax regime is relatively recent legislation, some aspects of which have not been tested in the courts or would not readily have comparable decisions available from other case law. The only available authority for a particular point of view may be the actual legislation. This may sometimes lead to the situation where the correctness of a particular position is subject to interpretation. What is required in such cases is that the employer has a well-reasoned argument as to how the appropriate statutory provision applies to the particular situation. The employers argument should be able to be

seen as likely as not to be the correct interpretation with a reasonable expectation that the argument would succeed in court.

29. The situation may occur where no clear precedent exists and the Commissioner has expressed his view of the matter in a public ruling, or in an advance opinion. The mere fact that a public ruling or an advance opinion has issued on a matter does not necessarily mean that the issue cannot be seen as contentious. For example, the employer may have a contrary view which is supported by a line of court decisions (which have not been overturned by any subsequent decisions). Clearly the matter is contentious even though the Commissioner's views on the correct operation of the law have been expressed. This does not mean that the employer can disregard the Commissioner's view as evidenced by public rulings and advance opinions. The employer should take particular note of the Commissioner's opinion and should not adopt alternative treatments unless there are sound reasons for doing so.

30. Where an employer is uncertain about the correct tax treatment of a benefit (or disagrees with the treatment suggested in a public ruling), the employer may apply for a private ruling. An employer who applies for and receives a private ruling will be expected to follow the ruling when determining their FBT liability. If the employer does not follow the ruling and as a result there is an understatement of FBT by reason of a false or misleading statement then it would be appropriate to impose a culpability component of 25%.

31. The culpability component of 25% discussed in paragraph 30 does not apply if there has been a decision of the AAT or of a court that applies to the private ruling. In such a case the employer would be expected to follow the decision of the AAT or court when determining the taxable amount of the return to be lodged, even if the employer has appealed against the decision. Failure to self assess in accordance with the decision of the AAT or court at the time of lodgment of a tax return would ordinarily amount to carelessness by the employer.

32. Where an employer seeks a private ruling after lodging the relevant tax return, the culpability component of 25% discussed in paragraph 30 does not apply. If the Commissioner rules against the employer, the Commissioner will amend the employer's assessment to give effect to the ruling. An application for a ruling after the return has been lodged may, however, qualify as a voluntary disclosure and so affect the rate of penalty that may be applicable to the understatement.

33. The circumstances could exist where the employer prepares a return in a particular way having regard to a decision of an independent tribunal or a court and, after the return is lodged, a court of higher authority overturns that decision, resulting in an understatement of taxable value by the employer. In these circumstances the statement

made by the employer is not regarded as a false or misleading statement, provided that the decision relied upon in the preparation of the return clearly applied to the employer's circumstances and, before the time of lodgment of the return the Commissioner had neither lodged an appeal or publicly announced his decision to do so. Where the Commissioner had chosen to appeal the decision, the employer should exercise care that all material facts are disclosed. This should include the information that the return was prepared on the basis of the particular decision but the decision is or may be contrary to the position adopted by the Commissioner.

Mitigating and aggravating circumstances

34. The extent to which the additional tax will be remitted may also be influenced by other factors. The variation from the typical rate as outlined, might be 10 to 25 % for each factor, depending on its significance. Serious cases may warrant a 25 to 50% increase in the culpability. A decrease from the suggested rate may be warranted where the employer has made a voluntary disclosure, or the level of co-operation is such as to be viewed as positive and beneficial to the timely completion of enquiries. On the other hand, an increase from the suggested rate may be warranted where deliberate steps have been taken to conceal the evasion of tax. For example, where the employer has falsified records or where there has been previous FBT evasion by the employer. The following are some examples of aggravating factors warranting an increase in the culpability component:

- after the FBT return is lodged the employer detects an error in the return but fails to notify the ATO;
- failure to maintain an adequate recording system for the purpose of ascertaining the employer's FBT liability; and
- failure to provide records in a timely manner.

Level of co-operation

35. It is appropriate for the authorised officer to consider the employer's level of co-operation as a factor warranting a variation from the typical rate. In so doing the extent to which time and resources have been affected should be considered. This benefits an employer that has taken active steps to assist the ATO. However, it must be emphasised that it is not intended to restrict an employer's rights in any way. For example, where a genuine claim of legal professional privilege is made, refusal by an employer to answer questions or provide documents will not be taken as a lack of co-operation. Nor should this be seen as restricting the employer's right

to put their case. An employer can strongly disagree with the Commissioner's view and yet offer positive co-operation to the ATO's enquiries. The following table sets out what is meant by the level of co-operation and the effect on the level of the culpability component of the additional tax.

Level of Co-operation	Description	Effect
Voluntary disclosure	Where an employer voluntarily discloses a breach of the FBT legislation.	**Decrease**
Positive co-operation	Where an employer or their representative's conduct has been more than reasonably co-operative. For example, an employer admits to a false and misleading statement after the beginning of an audit and this results in a significant saving in time and resources in completing the audit.	**Decrease**
Reasonable co-operation	Where an employer answers all relevant and reasonable questions truthfully and to the best of their ability and provides books and records in a timely manner.	**No Effect**
Less than reasonable co-operation	Where an employer causes undue or excessive delays in the completion of official enquiries, or fails to answer relevant and reasonable questions truthfully and to the best of their ability.	**Increase**
Deliberate attempt to conceal	Where deliberate steps have been taken to conceal the evasion of tax, for example, falsifying records.	**Increase**

Voluntary disclosures

36. A voluntary disclosure is seen as an act of admission done without prompting, persuasion or compulsion on the part of the ATO. If the disclosure is influenced by the direct action of the ATO it cannot be viewed as voluntary. For example, if an employer becomes aware that an existing audit will be extended to cover additional years and because of this makes a disclosure relating to the extended period, the disclosure would not be seen as voluntary. This is so, even though the employer only became aware of the audit extension informally, for example through discussions with audit staff. The employer must also have been aware of the ATO's action

and acted upon this knowledge. For example, where first contact has not been made, the mere internal listing of an employer's name for future audit by the ATO should not preclude a disclosure being considered voluntary.

37. A general statement by the Commissioner communicating the intention of a forthcoming focus on FBT audits in a particular industry is not seen as direct enough to preclude any consequential disclosures, prompted by the statement, from being considered a voluntary disclosure. On the other hand, in some specific circumstances, the ATO's action prompting the disclosure need not be directed individually at the employer.

38. Where a breach has occurred in the law relating to the FBT legislation, an employer who voluntarily discloses the breach is treated more leniently than one that does not make such an admission. This is consistent with the treatment of taxpayers in other tax regimes administered by the Commissioner. In terms of section 115, where an employer voluntarily admits to a false or misleading statement in respect of a 1992 or later year assessment, the culpability component of the additional tax will be reduced to one fifth of the amount that would have applied had the breach been discovered through ATO action (that is, by 80% of the amount which would otherwise have applied in the circumstances). For voluntary disclosures in respect of 1991 or earlier year assessments, the additional tax will comprise an interest equivalent of 10% per annum, up to a maximum of 50% of the understatement in any one year, with no culpability component.

39. Audits relating to other tax regimes (e.g., income tax, sales tax, superannuation guarantee, training guarantee, etc.) will generally be disregarded for the purposes of determining whether an employer has acted voluntarily in making a disclosure of a false or misleading statement unless:

- they are being conducted at the same time as the FBT audit; or
- the disclosure has a clear and direct association with the subject of the ATO enquiries and directly effects the calculation of the FBT liability. An example of this would be a disclosure prompted by income tax enquiry which examined the deductibility of expenses including those relating to the provision of fringe benefits.

40. Where the ATO informs an employer of a proposed FBT audit, any disclosures made before the beginning of the audit may still be treated as voluntary. An example would be where the employer arranges for a prudential audit within a time frame agreed to by the

audit manager. However, disclosures will not be treated as voluntary when the liability:

- was known or ought to have been known before the contact by the ATO; or
- subsequently becomes known, but is not disclosed before the beginning of the FBT audit.

41. Generally a disclosure will be treated as having been made before the ATO first makes contact with the employer if:

- at the time of notification, the focus of the audit or review as advised to the employer did not cover the type of tax shortfall disclosed by the employer; or
- it may be reasonably concluded that the employer would have made the disclosure even if the tax audit had not begun.

42. In order for a disclosure to qualify as a voluntary disclosure, it must:

- be in writing; and
- contain all relevant material facts.

The concessional treatment only applies to matters actually disclosed. If, for example, an employer makes a voluntary disclosure in relation to car fringe benefits returned under the statutory method and subsequent ATO enquiries reveal other errors for car benefits returned under the operating cost method, the concessional treatment will only apply to the items disclosed.

43. A disclosure by an employer after that employer has been informed of a tax audit, whilst not meeting the description of voluntary disclosures, may be accorded concessional treatment on the basis of positive co-operation and will generally qualify for a 20% reduction of the culpability component of the penalty otherwise attracted. For this to occur the disclosure must:

- be made before enquiries have commenced into the matter disclosed; and
- represent a level of co-operation and assistance by the employer that is well above what is ordinarily expected of an employer during the conduct of an audit.

44. It must be emphasised that although an employer has made a voluntary disclosure this does not necessarily preclude a prosecution. The decision whether to prosecute in such cases will be taken on the advice of the Director of Public Prosecutions. In no case should a tax

officer provide an undertaking to an employer that the employer will not be prosecuted.

Additional tax for failure to furnish return

45. Additional tax is imposed under subsection 114(1) where an employer refuses or fails to furnish an FBT return when and as required to do so under the Act. Where, as part of an audit, an employer is identified as having an FBT liability and the employer has not previously lodged an FBT return, then penalty for failure to furnish the return arises once the return is lodged or a default assessment is issued under section 73.

Remission of additional tax

46. When section 114 penalty is attracted, additional tax is payable at the rate of double the amount of tax payable by the employer in respect of the year of tax. However, the Commissioner will normally exercise the discretion available under subsection 117(3) to remit the additional tax to an amount that is considered reasonable given both the circumstances surrounding the failure to furnish the return and its consequences.

47. It is considered that the failure to lodge in these circumstances should attract a range of penalties similar to those applicable to lodging a return containing a false or misleading statement. Accordingly, and to be consistent, the penalty under section 114 in these circumstances will be remitted with reference to the guidelines applicable to the remission of section 115 penalties. That is, both an interest equivalent and a culpability component are to be included in the calculation to arrive at the appropriate level of remission under subsection 117(3).

48. In these circumstances, and consistent with the imposition and remission of section 115 penalty, the additional tax by way of penalty arising under section 93 is remitted in full. The inclusion of an interest equivalent as part of the calculation of the appropriate section 114 penalty is considered to be a special circumstance for the purposes of paragraph 93(4)(c) of the Act.

Penalty for unpaid tax

49. As outlined at paragraphs 13 and 48, where an interest equivalent has been included in the calculation of the appropriate section 114 and 115 penalty the additional tax by way of penalty under section 93 is remitted in full.

50. However, where tax raised as a result of an audit remains unpaid, additional tax under section 93 (late payment) will be imposed:

- in the case of primary tax;
  - from the date of issue of an amended assessment or a section 73 (default) assessment, or
  - from the date of lodgement of the return where the return has been lodged by the employer as a result of audit action, or
- in the case of section 114 and 115 additional tax;
  - from the date nominated in the notice of assessment of additional tax.

Additional tax for government bodies

51. Employers which are government bodies are excluded from the application of section 114 and 115. Where an adjustment is made to a return lodged by an employer which is a government body, additional tax by way of penalty for unpaid tax is to be imposed under section 93. The penalty is to be remitted under subsection 93(4) to an amount calculated using the interest rates listed in the table at paragraph 16.

Calculation of additional tax for 1995 and later years

52. From 1 April 1994 the amount of fringe benefits tax is based on the tax inclusive value of the benefit, calculated by using the following formula:

$$\text{Aggregate fringe benefits amount} \times \frac{1}{1 - \text{FBT rate}}$$

where the aggregate fringe benefits amount is the sum of the taxable values of individual benefits.

53. Concurrent with the change in the method of calculating the FBT liability, section 51(4A) of the ITAA has been repealed (also effective from 1 April 1994) to enable employers to claim an income tax deduction for the fringe benefits tax paid in respect of the 1995 and later FBT years.

Allowance for income tax deductibility

54. The additional tax to which an employer becomes liable under sections 114 and 115 is based on the excess of the tax properly payable by the employer over the tax that would have been payable if the false or misleading statement were correct. In order to reflect the availability of an income tax deduction, the amount of the excess on which the culpability component of the additional tax is imposed is to be nominally reduced by an amount equivalent to company income tax rate (currently 33%). For example, if the understatement of tax is $1000, the culpability component would be calculated by applying the appropriate rate to a net understatement of $670 (i.e., $1000 less 33%). This is subject to the comments in paragraphs 55 and 56 below.

Government bodies and other income tax exempt employers

55. The nominal reduction outlined in paragraph 54 is not to be made when calculating additional tax for employers which are government bodies or other income tax exempt employers. These employers are not entitled to income tax deductions for the amount of the FBT payable and hence no nominal reduction is to be made.

Rebatable employers

56. From 1 April 1994, a 'rebatable employer' as defined in subsection 65J(1) of the Act is entitled to a rebate of 48% of their fringe benefits tax liability. In determining the amount of any penalty under sections 114 or 115, the additional tax is to be calculated on the net understatement of fringe benefit tax remaining after taking into account the amount of the rebate available to the employer.

Reporting requirements of the authorised officer

57. When an authorised officer exercises the remission powers under subsection 117(3) he or she is required to make a full and specific report on the basis of the remission. Officers exercising the discretion to remit should ensure they record all the factors they have taken into account in exercising the discretion. In deciding the extent to which the statutory additional tax is remitted an authorised officer is required to:

- record the findings of fact;
- examine and consider the evidence on which the findings are based; and
- state the reasons for the decision.

58. In cases where the extent of the remission is challenged, the reviewing officer is required to carefully consider whether there is a case for varying the level of additional tax. In doing so, he or she should report on the basis of the decision and comment on all factors taken into account including those outlined in these guidelines.

Date of effect

59. This Ruling applies to years commencing both before and after its date of issue. However, the Ruling does not apply to employers to the extent that it conflicts with the terms of a settlement of a dispute agreed to before the date of issue of the Ruling (see paragraphs 21 and 22 of Taxation Ruling TR 92/20).

Explanations

Concept of false or misleading statement

60. For the purposes of these guidelines, a false statement is one which is erroneous or contrary to fact while a misleading statement is one which is capable of leading a reasonably prudent and competent person into error. A duty of care rests with the person to ensure that statements and disclosures to the ATO are truthful and complete. An intention to deceive is not a factor in the application of subsection 115(1). When a statement is false or misleading, although it is honestly made, it is still subject to additional tax.

61. The false or misleading statement concept was incorporated in various taxation laws in 1984. In March 1985, Taxation Ruling IT 2141 was issued to provide guidelines in the application of this concept where it was used in taxation laws then in existence. The introduction of FBT in 1986 also made use of this concept. The construction of section 115 is essentially the same as those employed in previous taxation laws. For this reason the principles embodied in IT 2141 are to be applied in determining whether or not a false or misleading statement has been made for the purposes of section 115.

62. Although covered more fully in IT 2141, the following points now adopted in relation to subsection 115(1) should be noted:

- the subsection automatically comes into effect where the conditions for its operation exist
- subsection 115(1) applies to statements made orally (paragraph 7 of IT 2141)

- a statement will be false if it is contrary to fact, untrue, erroneous or incorrect (paragraph 18 of IT 2141)
- a statement will be misleading if it is capable of leading a reasonably prudent and competent ATO officer into error even if the particular officer in question is not misled (paragraphs 13 and 26 of IT 2141)
- a statement as to a particular view of the proper operation of the law is not false or misleading even though it may be inaccurate (paragraph 14 of IT 2141)
- the omission of taxable value from a return is to be taken as a statement to the effect that the fringe benefit was not provided (paragraph 22 of IT 2141)
- if a matter or thing is left out of a statement in a return and that matter or thing, if known, would cause an officer to determine a claim in another way, that statement will be misleading in a material particular (paragraph 35 of IT 2141)
- subsection 115(1) applies to each false or misleading statement.

Deliberate evasion

63. Whether an employer's actions amount to 'deliberate evasion' may be determined on the basis of direct evidence of the employer's intention, but will more likely need to be inferred from the surrounding circumstances and conduct of the employer. (See the High Court decision of *Denver Chemicals Manufacturing Co. v. C of T (NSW)* (1949) 79 CLR 296 at 313).

64. The use of the term 'deliberate evasion' further focuses on the intention of the employer. Deliberate evasion is more than evasion brought about by circumstance. The ordinary interpretation of the word 'deliberate' can be taken as meaning a 'fully considered course of action with a clear intention'. So, what is involved in intentional behaviour is the directing of the mind, having a purpose or design (*R v. Willmot* [1985] 2 Qd R 413). A person's intention is a question of fact. It may be proved by direct evidence of a person's state of mind (e.g., an admission), but may also be inferred from the circumstances and conduct of the person. In this regard a person is normally presumed to intend the natural consequences of his or her own acts (*Lloyds Bank Ltd v. Marcan* [1973] 2 All ER 359*)* although such a presumption may be rebutted by other evidence. Clearly, if the deliberate steps had been taken to disguise or hide the transaction, this would be a circumstance which would infer that the employer had

acted intentionally and may attract an additional amount for deliberate hindrance.

65. The employer's action cannot be seen as deliberate evasion if the taxability of a particular amount is unclear, and an employer chooses not to return the amount. If the employer takes a view that differs from the Commissioner's this is not deliberate evasion provided that view was honestly held, and was not frivolous or unfounded. The employer may, of course, still be liable for penalty for recklessness or carelessness.

Recklessness

66. The term 'reckless' has recently been explained in Taxation Ruling TR 94/4 as it applies to the income tax regime. The term has equal meaning and application for FBT purposes. Although covered more fully in TR 94/4 the following points should be noted as to its application to the Commissioner's discretion to remit additional tax in accordance with subsection 117(3):

- the ordinary meaning of the term recklessness involves something more than mere inadvertence or carelessness (paragraph 15 of TR 94/4);
- recklessness is gross carelessness - the doing of something which in fact involves a risk, whether the doer realises it or not, and the risk being such having regard to all the circumstances, that the taking of that risk would be described as 'reckless'. It involves the running of what a reasonable person would regard as an unjustifiable risk (paragraph 16 of TR 94/4);
- the finding of dishonesty is not necessary to a finding of recklessness, it is sufficient that the person's behaviour displayed a high degree of carelessness and indifference to the consequences;
- a person would be acting recklessly if:
  - they committed an act which created a risk of a particular consequence occurring (e.g., making a false statement resulting in the omission of taxable fringe benefits);
  - having regard to the particular circumstances of the person, they knew or ought to have known the facts and circumstances surrounding the act would have or ought to have been able to foresee the probable consequences of the act;

- the risk would have been foreseen by a reasonable person as being great, having regard to the likelihood that the consequences would occur, and the likely extent of those consequences (e.g., the effect on the FBT liability); or
- when the person committed the act with indifference to the possibility of there being any such risk, or recognised that there was such risk involved and they had, nonetheless, gone on to do it. That is, the person's conduct clearly shows disregard of, or indifference to, consequences foreseeable by a reasonable person (paragraph 17 of TR 94/4).

Carelessness

67. Employers are required to conduct their FBT affairs in a careful and reasonable manner and must take reasonable care in identifying and addressing all issues when preparing their returns. A careless act is one made as a result of negligence or thoughtlessness on the employer's part, producing a result which the employer could reasonably be expected to recognise as incorrect or at least subject to doubt. In the context of section 115, a careless act would result in an underpayment of FBT. In this situation, it would be expected the employer could satisfactorily explain the reason for the error or omission.

68. The following points should be noted as to its application to the Commissioner's discretion to remit additional tax in accordance with subsection 117(3):

- while carelessness may result in making (or failing to make) a statement, it may equally result in an act or omission which lies behind the making of a statement. Failure to maintain adequate records will be a major reason for finding that an employer has been careless
- if the employer is uncertain about the correct tax treatment of an item, it would be careless for the employer not to make reasonable enquiries to resolve the issue. Where an employer is uncertain about the correct FBT treatment of an item, the employer may apply for a private ruling in accordance with Taxation Ruling TR 93/1
- arithmetic errors may indicate carelessness, but each case will turn on the circumstances, including the size, nature and frequency of the error. As a general proposition, employers could be reasonably expected to be accurate in record keeping and in detailing calculations necessary to

be able to accurately prepare an FBT return. The adequacy of the system should be reflected in the procedures, controls and employee training inherent in it. An adequate recording system should be designed to prevent careless errors occurring. In this regard FBT employers should ensure that their recording system is adequate and reasonable in meeting the requirements of the legislation. An over emphasis on corporate or income tax account systems may not be specific enough to make available the information required by the FBT legislation.

Examples

Example 1

Facts

69. The employer in his 1991 and 1992 FBT returns declared the taxable value of ten cars owned by him and provided to employees located at his city office. A further three cars, which were leased by the employer and provided to the branch manager and two service managers at a country branch, were identified during an audit as not being returned for FBT. The later year FBT returns were lodged correctly by the employer. The employer stated that the cars were omitted because staff preparing the FBT returns for these years relied on a schedule listing depreciable assets to identify motor vehicles that could give rise to a car fringe benefit.

Matters considered

70. The authorised officer concluded that:

- there had been an omission from the FBT return of the employer which was misleading in a material particular;
- there had been no intention to deceive;
- the omission was a result of carelessness on the part of the employer;
- the omission was more than minor carelessness or even an inadvertent error or honest mistake in that the employer could reasonably have been expected to recognise that not all the car fringe benefits had been accounted for on the FBT return.

Decision on remission

71. Having regard to the above matters the authorised officer considered that the section 115 additional tax should include an amount for:

- the interest equivalent
- a culpability component of 25% corresponding to the mid range of carelessness. There were no factors present which would suggest either an increase or decrease of the additional tax.

Example 2

Facts

72. The employer provided as part of the salary package of its Australian sales manager an interest free loan of $250,000 starting on 1 January 1991. The employee, with the knowledge of the employer, used the loan to help finance a more expensive private residence. As a condition for the employer to make the loan available, the employee agreed to provide a declaration each FBT year stating that the loan was used to purchase income-producing shares. He also declared that he would have been entitled to an income tax deduction for all of the interest if he had in fact paid interest on the loan. The employer provided the declarations to the auditor in support of the value of the loan fringe benefit being reduced to nil on the 1991, 1992 and 1993 FBT returns. Questioning of the employee by the auditor uncovered the facts regarding the circumstances of the loan as outlined above.

Matters considered

73. The authorised officer concluded that:

- there had been an omission from the FBT return of the employer which was misleading in a material particular;
- the omission was a deliberate action on the part of the employer taken with the intention to evade the FBT properly payable;
- the involvement of the employee in this way amounted to a deliberate attempt to conceal the understatement of the FBT taxable amount.

Decision on remission

74. Having regard to the above matters the authorised officer considered that the section 115 additional tax should include an amount for:

- the interest equivalent;
- in 1991 a culpability component of 55% being made up of 45% being the appropriate penalty for deliberate evasion plus an additional 10% in respect of the deliberate steps taken to conceal the understatement;

- in 1992 and 1993 a culpability component of 85% being made up of 75% being the appropriate penalty for deliberate evasion plus an additional 10% in respect of the deliberate steps taken to conceal the understatement.

The matter was also referred to the Director of Public Prosecutions for possible prosecution action.

Example 3

Facts

75. The employer provided as part of the salary package of its Western Australian regional manager an interest free loan of $20,000 starting on 1 February 1991. The employer's understanding when agreeing to provide the loan was that the money would be used to assist in the purchase of a rental property by the employee. In actual fact the employee used the funds from the loan to purchase a twenty foot sailing boat which he used for recreational purposes only. Each FBT year the employee provided to the employer a declaration stating that the loan was used to purchase a rental property. He also declared that he would have been entitled to an income tax deduction for all of the interest if he had in fact paid interest on the loan.

Matters considered

76. The authorised officer concluded that:

- there had been an omission from the FBT return of the employer which was false or misleading in a material particular;
- the responsibility for the making of the incorrect declaration rested solely with the employee who without his employer's knowledge diverted the loan to a private purpose and provided declarations which did not reflect the actual use of the loan funds;
- the employer did not know and could not have expected to have known that the declaration provided by the employee was incorrect.

Decision on remission

77. Having regard to the above matters the authorised officer considered that the section 115 additional tax should include an amount for:

- the interest equivalent only;

- no culpability component as the employer had made the statement in good faith and there was no evidence of collusion between the employer and the employee.

The matter was also referred to the Director of Public Prosecutions for possible prosecution action against the employee.

Commissioner of Taxation

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legislative references
- FBTAA sections 65J, 68, 73, 90, 92, 93, 114, 115, 117 and 136(1)
- ITAA sections 51(4A), 170AA and 214A
- TAA section 85

case references
- Denver Chemicals Manufacturing Co. v. C of T (NSW) (1949) 79 CLR 296;
- R v. Willmot [1985] 2 Qd R 413;
- Lloyds Bank Ltd v. Marcan [1973] 2 All ER 359