IT 2517 - Income tax: remission of additional tax imposed by subsection 223(1) and former subsection 226(2) of the Income Tax Assessment Act 1936

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TAXATION RULING NO. IT 2517

INCOME TAX: REMISSION OF ADDITIONAL TAX IMPOSED BY SUBSECTION 223(1) AND FORMER SUBSECTION 226(2) OF THE INCOME TAX ASSESSMENT ACT 1936

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OTHER RULINGS ON TOPIC IT 2141.

PREAMBLE This ruling replaces Taxation Rulings Nos. IT 2012, 2028, 2043 and 2206 that deal with the Commissioner's discretion to remit the statutory additional tax imposed by former subsection 226(2) and/or subsection 223(1). The remission guidelines outlined in this ruling are applicable in cases involving subsection 223(1) and former subsection 226(2) additional tax including those which become subject to review as a result of a request by the taxpayer, an objection against the assessment or an appeal against a decision on an objection. Consequently, all references to the current sections 223 and 227 can be taken to also refer to the former relevant sections unless otherwise stated.

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ATTACHMENT

- EXAMPLES OF THE APPLICATION OF REMISSION GUIDELINES

Application of Section 223 (and former Subsection 226(2))

2. Prior to 14 December 1984, additional tax was automatically imposed by former subsection 226(2) where a taxpayer omitted from his or her return any assessable income, claimed as a deduction or rebate in that return expenditure in excess of that actually incurred or included false information relating to a claim for certain rebates. Under former subsection 226(3), the Commissioner had the power to remit the additional tax in whole or in part for reasons which he thought fit. With effect from 14 December 1984, section 223 replaces the former subsection 226(2) and section 227 replaces former subsection 226(3).

3. Before these guidelines for remission can apply, subsection 223(1) (or the former subsection 226(2)) has to be attracted. Subsection 223(1) automatically imposes additional tax where a taxpayer makes a statement that is false or misleading in a material particular, or omits something so as to make the statement misleading in a material particular and, in the result, there is or would have been, avoidance of tax. Therefore, before applying these guidelines officers need to have determined that the facts of the case before them are such that additional tax (subsection 223(1) or the former 226(2)) has been imposed in the first place. A detailed discussion of the application of section 223 is contained in IT 2141 with which

officers should be familiar. These remission guidelines do not address in detail the question of whether subsection 223(1) (or the former subsection 226(2)) is applicable to a particular situation - that is, whether additional tax is imposed by the subsection. They are primarily concerned with the remission of subsection 223(1) (or the former subsection 226(2)) additional tax. Unless otherwise stated, these remission guidelines will apply equally in respect of the remission of subsection 223(1) and former subsection 226(2) additional tax.

4. Although covered more fully in IT 2141, the following points in relation to subsection 223(1) should be noted -

- The subsection automatically comes into effect where the conditions for its operation exist.

- The subsection applies to statements made on or after 14 December 1984 including statements made on or after that date in relation to taxation matters of earlier years.

- The subsection imposes additional tax where a taxpayer makes a statement (including an oral statement) to a taxation officer, or to another person for a purpose in connection with the operation of the Act or regulations, that is false or misleading in a material particular or omits something from such a statement that renders it misleading in a material particular and, in the result, there is or would have been avoidance of tax. The omission of assessable income from a return is within the scope of the subsection.

- Subsection 223(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 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 assessable income from a return is to be taken as a statement to the effect that the income was not derived: subsection 223(7) (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 223(1) applies to each false or misleading

statement.

- The statutory additional tax imposed under subsection 223(1) is double the amount of tax that would have been avoided.

- Section 223 contains special provisions relating to a false or misleading statement by a partner or trustee.

- Statutory additional tax is imposed in situations where it has been argued that the former subsection 226(2) did not apply, for example, where claims are made for items such as bad debts, depreciation, carry-forward losses.

5. For subsection 223(1) to apply, a taxpayer must have made a statement that is false or misleading in a material particular or omitted something from such a statement that renders it misleading in a material particular and, in the result, there is or would have been avoidance of tax. Subsection 223(1) is not attracted where a false or misleading statement does not affect the taxpayer's assessed liability. The inclusion of a subsection 169A(2) request in a return would exclude the application of subsection 223(1) unless there is present a false or misleading statement or there has been an omission of a material particular. The additional tax provision also does not apply where an amendment to an assessment is required to adjust the taxpayer's claim in respect of an item in the return which, while leading to an increase in his or her assessed liability, has been adequately explained in the return. In the latter case, while subsection 223(1) does not apply, interest may be payable under section 170AA.

6. Section 170AA provides for the payment of interest at a prescribed rate where an assessment for the 1985-86 or subsequent year of income is amended and section 223 does not apply. The Commissioner has the power under subsection 170AA(11) to remit the interest charge. Guidelines for the remission of section 170AA interest are set out in IT 2444.

RULING Discretion of Deputy Commissioners and authorised officers

7. In providing these guidelines, there is no intention of laying down any conditions to restrict Deputy Commissioners and authorised officers in the exercise of the discretion to remit additional tax. It is essential that Deputy Commissioners and authorised officers retain the flexibility necessary to deal with each particular case on its merits. What is being attempted in this ruling is to set out for the information of officers a guide as to the manner in which the discretion might generally be exercised.

8. It is emphasised that these guidelines do not represent a general exercise of the power of remission - they cannot. The legislation requires that the power to remit must be exercised in the light of the facts of each particular case. These guidelines are provided to assist officers in the exercise of the discretion and to help ensure that taxpayers do not receive inconsistent

treatment. At all times, these remission guidelines should be administered in a commonsense manner and those officers exercising the discretion should detail what factors they have taken into account in their deliberations (refer paragraph 16).

9. Under the repealed subsection, the Commissioner could, in any case, for reasons which he thought sufficient, remit the statutory additional tax. Subsection 227(3) re-enacts for practical purposes the repealed remission provision. The introductory and substantive words of subsection 227(3) provide-

> "The Commissioner may, in the Commissioner's discretion, remit the whole or any part of the additional tax payable by a person under a provision of this Part ...".

Consequently, what an authorised officer is doing under subsection 227(3) in determining a rate is remitting additional tax, in whole or in part, that has already been imposed by statute. The extent of any remission of additional tax will continue to depend upon the sufficiency of reasons in each case.

10. In subsection 223(1), deceit is not an element; the subsection is attracted when a statement is misleading, notwithstanding that it is honestly made. However, as indicated in IT 2141, matters such as intent, knowledge, honesty, etc., may be taken into account in considering any remission of additional tax under subsection 227(3).

11. Although subsection 223(1) is clearly intended to penalise heavily taxpayers who seek to evade their correct liability to tax, it is equally obvious that this legislation is not to be administered so as to be seen as oppressive by those taxpayers who, although caught by subsection 223(1), have made an honest attempt to fulfil their obligations under the income tax law. Subsection 227(3) recognises that, in the context of subsection 223(1), there are degrees of culpability. Some situations will require substantial additional tax, others less substantial. Some, although these will be exceptional (refer paragraph 81), may not warrant any additional tax at all.

12. Penalties are an integral part of our taxation system. Taxpayers are expected to fully and accurately disclose relevant matters in their returns and this carries with it a significant duty of care. While the penalty provisions are accordingly attracted by a failure to meet that duty, those provisions also help to encourage voluntary compliance, on which our taxation system heavily depends. The administration of those provisions for which this ruling provides guidance should bear those principles in mind.

13. It is important, also, to keep in mind that the legislation has to be administered in the context of the realities and practicalities of taxpayers fulfilling their income tax obligations. The complexity of the tax law makes it difficult for some taxpayers to understand and satisfy all of the law's requirements. It is not always practicable for taxpayers to include full and complete details of every item that forms part

of their returns of income. Judgments have to be made about how much information should or needs to be provided in justification of claims made. The assessability or deductibility of most items is generally beyond doubt. However, in the case of marginal or contentious items, if critical information has been omitted or incorrectly stated, and a view contrary to that of the taxpayer is taken, the taxpayer runs the risk of additional tax under subsection 223(1) being imposed.

Calculation of Additional Tax Where More Than One False or Misleading Statement is Detected.

14. Subsection 223(1) applies to each false or misleading statement. Where more than one false or misleading statement is detected and distinctions can be made in terms of the gravity of each false or misleading statement, then additional tax should be remitted according to the factors present which add to or lessen the seriousness of each statement, e.g., deliberate evasion vis-a-vis inadvertence.

15. There may, of course, be situations where it is not possible to identify specific errors or omissions, e.g., when using Asset Betterment or T-Account techniques. In such cases, authorised officers will be left with little choice but to impose a single (all embracing) culpability component having regard for the general gravity of the errors or omissions, e.g., the nature of error or omission and/or the merits of available evidence including any explanation provided by the taxpayer.

Reporting Requirement in Audit or Any Other Relevant Reports

16. Because of the requirement in the law to exercise the power of remission separately in each case, officers are required to comment specifically and separately in their reports or additional tax submissions on all factors they have taken into account in determining the extent of any remission recommended in respect of each false or misleading statement. In deciding the extent to which the statutory additional tax is remitted, officers exercising the discretion should ensure they record -

(a) the findings of fact;

(b) the evidence on which the findings are based; and

(c) state the reasons for their decision.

In the event that the extent of the remission in a case is challenged in any way, the reasons for the decision will be apparent.

17. 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 that person should also take account of these guidelines.

GUIDELINES FOR REMISSION OF SUBSECTION 223(1) ADDITIONAL TAX

18. The general remission guidelines set out in these paragraphs should be applied to all false or misleading statements penalisable under subsection 223(1) except, of course, statements in respect of which prosecution action has been instituted against the taxpayer and not withdrawn (see section 8ZE of the Taxation Administration Act 1953). The guidelines are intended to apply to all taxpayers. However, separate rulings will issue dealing with the special position in relation to additional tax imposed on a defaulting partner under subsection 223(2) and on a trustee under subsection 223(4).

Explanation of Terms Used in Ruling

19. A brief explanation of some of the terms as they are used in this ruling appears below-

Deliberate evasion	an intention to deceive the Commissioner with the object of evading tax, or the making of a false or misleading statement knowingly or without belief in its truth.
Recklessness (short of deliberate evasion)	would include a statement or omission rashly made without any real basis of fact on which to base the statement or omission, or a statement or omission made without regard to the consequences. A finding of dishonesty is unnecessary.
Carelessness	would include inattentiveness or thoughtlessness on the taxpayer's part producing a result which the taxpayer could reasonably be expected to recognise as incorrect or at least subject to considerable doubt. (It would be expected the taxpayer could satisfactorily explain the reason for the error or omission).
Carelessness of a minor nature	as for 'carelessness', however the circumstances surrounding the error or omission are relatively less serious.
Inadvertent error Honest mistake	where, on the evidence available, the taxpayer has made an obvious attempt to meet his or her tax obligations but in so doing has made an honest error or omission not producing a result which the taxpayer could reasonably be expected to recognise as incorrect or at least subject to doubt.
Contentious item	where the relevant law (whether statute or case law) is unsettled or where, although the principles of law are settled, there is a serious question about the application of those principles to the circumstances of the particular case. An argument based on sound business practice would not of itself be regarded as falling into this category of case, e.g., the write-down or write-off of trading stock for no reason other than following the accounting doctrine of conservatism. Also, an adjustment will

not be regarded as 'contentious' for the purposes of remission of additional tax where the basis of any dispute is the adequacy of the evidence or because the precise amount of the adjustment cannot be proved.

NOTE : It is emphasised that the concepts explained above represent matters of degree. The explanations are provided as a guide only.

20. Situations calling for the exercise of the power of remission in subsection 227(3) fall into two broad categories, i.e. voluntary admissions of a false or misleading statement and non-voluntary cases.

Voluntary Admission of a False or Misleading Statement

21. It is a longstanding practice of the Commissioner to treat leniently those taxpayers who come forward voluntarily and disclose the fact they have breached the taxation legislation. In keeping with this practice, where there has been a voluntary admission of a false or misleading statement or omission of income, the additional tax imposed by subsection 223(1) may be remitted to an extent necessary to reduce the additional tax to an amount equal to 10% per annum of the tax avoided, subject to a maximum of 50% of the tax avoided in any year. A "culpability" component, (see paragraph 34), is not imposed in voluntary admission cases.

22. In extremely rare cases, it may be considered fair and reasonable to fully remit the "per annum" component, e.g., where a taxpayer genuinely did not know that he or she was entitled to an amount of income, but, having become aware of that entitlement, immediately disclosed the matter to the ATO.

23. Where a voluntary admission is made after a return is lodged but before an original assessment notice issues, subsection 223(1) additional tax should be fully remitted. This recognises that effectively there is no actual avoidance or evasion of tax until the due date for payment (30 days after the issue date of a notice in a refund or non-taxable case), specified in the notice of assessment, has passed.

24. To qualify for the concessional treatment referred to in paragraph 21, there must be -

(i) a full and true disclosure of all relevant material facts necessary for a correct assessment

and

(ii) such disclosure must not be due to ATO activities in connection with the taxation liability of the taxpayer concerned under any of the Acts administered by the Commissioner.

25. Under (i) if the disclosure is incomplete but the degree of incompleteness is insignificant, the case may still be treated as a

voluntary disclosure. Where, however, a taxpayer voluntarily discloses an omission of income or an incorrect claim and subsequent ATO enquiries reveal a further, significant understatement or incorrect claim which he or she may reasonably be suspected to have known about at the time the partial disclosure was made, the concessional treatment should be denied. Similarly, the disclosure of the ownership of assets for other purposes will not usually amount to a voluntary disclosure, for income tax purposes, of omitted income derived from those assets.

26. In relation to (ii), disclosures are sometimes claimed to be voluntary when, in fact, they are prompted by ATO action which has already been initiated i.e., the ATO has already made contact with the taxpayer or his or her representative. That contact may have indicated to the taxpayer that his or her affairs are being audited. Such action may comprise direct enquiries of the taxpayer, an initial interview prior to audit or a request for a statement of assets and liabilities, or an audit of his or her liability to other taxes. For instance, omitted income may be disclosed by a taxpayer consequent upon an audit for the purpose of sales tax or in connection with tax instalments deducted from salary or wages of employees under the PAYE system. Such disclosures should not be treated as voluntary.

27. The concessional treatment for voluntary disclosures would be available even though enquiries by the ATO have been commenced and the taxpayer could reasonably expect that he or she will be the subject of enquiry provided the disclosure is made before the ATO makes first contact with the taxpayer or his or her representative. An example would be where an employee of a company comes forward to declare omitted income derived from work done for the company after the ATO has begun issuing query letters progressively to other employees who are believed to have omitted income for work performed for that company. As the taxpayer had not yet received a letter from the ATO he could seek to have his disclosure treated as a voluntary admission.

28. Similarly, where the ATO is conducting a project or review on an industry-wide or geographic basis, e.g., taxpayers involved in a particular profession or trade or taxpayers living in a certain district, this would not, of itself, preclude a taxpayer who is engaged in one or more of these industries or lives in a certain geographic region from the possibility of a voluntary disclosure on his or her part. Also, the mere listing of a taxpayer's name for future audit does not preclude the possibility of a voluntary disclosure on the taxpayer's part, provided first contact has not been made by the ATO. The general message is, the earlier disclosure is made, the better.

29. In the case of a partnership however, a disclosure made by a partner after the ATO has first made contact with the representatives of the partnership of which he or she is a member is not regarded as voluntary in the sense of warranting concessional treatment. Similarly, a disclosure made by a taxpayer after first contact with a trust or private company in which the taxpayer is a principal beneficiary or shareholder (or director) should not be treated as voluntary if the disclosure relates to the

taxpayer's interest in the trust or private company. A disclosure by a taxpayer following the audit of one of his or her relatives or other taxpayers in his or her district may be accepted as a voluntary disclosure so long as no ATO action concerning the taxpayer personally or an associated partnership, trust or private company has been initiated

30. It should be noted that, although a disclosure may not be voluntary as defined in this ruling in the sense of warranting a reduced (10%) "per annum" component, a reduction in the "culpability" component which might otherwise have been imposed should be considered where the taxpayer has been positively co-operative (see paragraphs 50-52). Such a disclosure could arise, for example, where, during the course of an income tax audit, a taxpayer realises that a false or misleading statement was made in relation to sales tax and discloses the error. It was originally not intended that the audit cover sales tax. In such a case, a reduction in any "culpability" component which may otherwise have been imposed would be warranted.

Non-Voluntary Detection of a False or Misleading Statement

31. This category covers the situations most commonly encountered, i.e. where, as a result of action taken by the ATO, assessable income is found to have been omitted from returns or deductions or rebates have been overclaimed.

32. In these cases the discretion under subsection 227(3) would generally be exercised to reduce the statutory additional tax imposed by subsection 223(1) to an amount equal to -

a per annum rate of interest applied to the tax avoided for the period during which tax has been avoided (the "per annum" component). The rate will be equivalent to the rate prevailing under section 170AA and, unlike the former policy (20% per annum), contains no penal (or culpability) element whatsoever. (See Note below)

plus

where appropriate, a flat percentage of the tax avoided (the "culpability" component).

Note : If tax was avoided over a period during which different rates prevailed for section 170AA purposes, the "per annum" component should be calculated on the basis of the differing rates for the relevant periods concerned. The per annum rate of interest to be applied in respect of tax avoided for the 1987/88 or earlier years will be 14.026%.

Additional tax calculated in accordance with the guidelines cannot, of course, exceed the statutory maximum, i.e., 200% of the tax avoided.

33. The "per annum" component is intended to compensate the Revenue for the full amount of tax not having been paid by the due date. In certain circumstances, the "per annum" component may warrant further remission (see paragraph 81).

34. The "culpability" component is separate from the "per annum" component and reflects the gravity of the offence or the wrong doing of the taxpayer. It operates primarily in terms of the principle that the culpability of the taxpayer's actions is a function of the reason for or motivation of his or her actions. It will also account for the extent to which a taxpayer has assisted or facilitated ATO enquiries (paragraphs 46-52 refer).

. Commencement point for calculation of the "culpability" component

35. As a starting point, the level of the "culpability" component for remission purposes is NIL% of the tax avoided. The paragraphs that follow outline some of the factors to be taken into account in determining the appropriate level of the "culpability" component to be ultimately imposed. In assessing culpability, it should be kept in mind that a duty of care rests on the taxpayer to ensure his or her statements and disclosures to the ATO are truthful and complete.

. Factors likely to influence the level of the "culpability" component

36. Some of the factors that should be taken into account in determining the appropriate level of the "culpability" component are listed below. However, it is pointed out the list is not intended to be exhaustive; it is merely illustrative. In the final analysis, the responsibility rests with authorised officers to apply the law to the facts and circumstances of each case, in the light of these guidelines, and in a reasoned and consistent manner.

37. Subject to the above comments, the more common factors to be considered in determining whether a "culpability" component of a particular amount should be imposed would be where -

(a) the taxpayer has been genuinely misled by actions of the ATO;

(b) the taxpayer did not know and could not reasonably be expected to have known or suspected that the statement was false or misleading;

(c) the taxpayer's statement even though false or misleading, has occurred through an inadvertent error or honest mistake; and there was no intention to deceive but the taxpayer may not have exercised sufficient care (see paragraph 19);

(d) the taxpayer has genuinely misunderstood the requirements or the application of the law, e.g. has been misled by his or her reading of the return form or

related instructions although the form or instructions were not inherently misleading;

(e) the taxpayer's statement was plainly careless (i.e. not reckless) (see paragraph 19);

(f) the taxpayer's statement was reckless (see paragraph 19);

(g) the taxpayer's statement was due to deliberate evasion (see paragraph 19);

(h) the ATO adjustment is clearly contentious (see paragraph 19). A lower level of additional tax should be considered where the adjustment is open to genuine dispute. The nature and extent of disclosures originally made in the return would be the relevant factors. Where subsection 223(1) additional tax is attracted, the fuller the disclosure the greater the case will be for a lower "culpability" component. A taxpayer making a request under subsection 169A(2) has the same duty of care as is required when completing his or her return form. If the request contains a false or misleading statement or there is an omission of a material particular, subsection 223(1) applies. The fact that the request was made may constitute a mitigating factor where it throws light on the state of mind of the taxpayer at the time the false or misleading statement or omission was made.

38. In deciding the level of the "culpability" component in circumstances such as those indicated in the previous paragraph, it would be appropriate, (except for those cases involving deliberate evasion), to also have regard to certain other factors, for example -

(i) the taxpayer has not previously been subjected to additional tax under section 223, or former section 226, and the tax avoided is relatively minor;

(ii) the age of the taxpayer;

(iii) at the time of preparing and lodging a return of income, the taxpayer or some immediate family member is suffering from serious illness or other like problems;

(iv) any language and other genuine comprehension difficulties the taxpayer may have, e.g., the taxpayer may be lacking substantially in literacy and/or numeracy skills; and

(v) the complexity of the taxation matters involved when related to the taxpayer's technical knowledge and experience.

39. Where the taxpayer's offence is considered to be partly, or substantially, but not wholly excusable, a lower "culpability" component may be warranted.

40. Where the circumstances are such that the taxpayer's offence is considered to be wholly excusable, a "culpability" component is not warranted. In such circumstances, the "per annum" component may also warrant reduction (see paragraph 81).

. Schedule of typical base criteria and "culpability" component ranges

41. Having regard to the comments at paragraph 36, and to the factors at paragraphs 37 and 38, the following chart is intended to provide authorised officers with an indication of the extent to which subsection 223(1) additional tax might normally be remitted. The criteria and the additional tax ranges appearing below are intended to be a guide only. When a range has been chosen as appropriate in a particular case, an authorised officer will need to determine an appropriate percentage within that range - whether it be the lower end, the middle or the upper end of the range - after reviewing all the relevant facts and circumstances which attracted the application of section 223. If the circumstances of a particular case involve the listed factors or other factors not specifically referred to in this Ruling which warrant adjustment of the "culpability" component to a point outside the range suggested, officers should not feel constrained in acting accordingly. Reasons for the decision should, of course, be adequately documented in an audit or any other relevant report (see paragraph 16).

REASON FOR THE FALSE OR MISLEADING STATEMENT	ADDITIONAL TAX	
	"PER ANNUM" COMPONENT	"CULPABILITY" COMPONENT
. Deliberate evasion (without aggravating factors)	YES	45
. Recklessness (short of deliberate evasion)	YES	30-40
. Carelessness	YES	15-30
. Minor case of carelessness	YES	5-15
. Inadvertent error, honest mistake, dependent on the degree of care	YES	0-5
. Contentious item	YES	0-5
. Genuine misunderstanding of the requirements of the legislation (see	YES	NIL

paragraph 37(d))

. Did not know and could not be expected to know	NO	NIL
. Genuinely misled by actions of the ATO	NO	NIL

. Circumstances Warranting in Increase in the "Culpability" Component

42. Subject to the total penalty ("per annum" component plus "culpability" component) not exceeding the statutory 200% of the tax avoided, there are many circumstances where an increase in the "culpability" component calculated in accordance with the previous paragraphs would be warranted.

43. Depending on the particular circumstances, the "culpability" component may warrant an increase of 5% - 50% of the tax avoided where any or each of the following circumstances exist -

(a) Where a taxpayer, after making a false or misleading statement due to an inadvertent error or carelessness, subsequently became aware of the error or omission and failed to take steps to notify the ATO of the error or omission (see paragraph 44(i)). In such circumstances, unless other aggravating factors are also present, the "culpability" component should generally not exceed the typical rate suggested for 'deliberate evasion', viz, 45% of tax avoided.

(b) There has been a lack of reasonable co-operation which has caused undue/excessive delay in the completion of official enquiries, and/or there has been obstruction or hindrance (see paragraph 44(ii)).

(c) Deliberate steps have been taken, either before or after commencement of official enquiries, to conceal the evasion of tax (see paragraph 44(iii)).

(d) The steps in (c) above have involved third parties, e.g., employees, in corruption or collusion (see paragaph 44(iv)).

(e) There has been previous tax evasion by or on behalf of the taxpayer (see paragraph 44(v)).

(f) There are other factors not covered by (a) to (e) which might add to the taxpayer's degree of culpability, e.g.,

. the taxpayer has advised or encouraged others in the practice of tax evasion.

44. The following are some examples of aggravating factors warranting an increase in the "culpability" component. The seriousness of these factors will depend on the facts of each case-

(i) A taxpayer is detected as having established, subsequent to the lodgment of his or her tax return, that, for example, an inadvertent error or honest mistake has been made in the return. The taxpayer failed to inform the Commissioner of the error or mistake.

(ii) A taxpayer unreasonably delays responding to ATO enquiries (written or oral). For example, he or she -

- has resorted to delaying tactics;
- fails to attend an interview without due excuse; or
- fails to adhere to appointments.

A taxpayer who fails to provide records in a timely manner but who does not cause undue/excessive delay would generally warrant only a moderate adjustment to the "culpability" component. A significantly greater percentage would, however, apply to a situation where the taxpayer's behaviour during an audit causes extensive delays or borders on obstruction.

(iii) Examples of aggravating factors relating to record-keeping and concealment are -

- falsification of accounts, invoices, cheque butts or other financial records or information.
- the maintenance of a second set of books for the purpose of concealing income.
- failing to keep any, or any proper, records or system for recording income and expenditure.
- deriving income under a false name or maintaining or holding assets under a false name with the intention of defeating the purposes of the income tax law.
- failure to produce records (e.g., bank accounts) at the beginning of an audit which are subsequently found to reveal income which has been deliberately concealed.
- Failure to initially answer some questions honestly with the intention of deceiving the Commissioner.

These acts will be of varying degrees of seriousness. The higher end of the range i.e., 25-50% should be

reserved for the more serious cases.

(iv) The taxpayer has involved an employee, tax agent or another person in deliberate steps to conceal income or support a false claim. The "culpability" component should also be increased where, taking those steps, the taxpayer conspires or colludes with another person. An example of circumstances warranting an increased additional "culpability" component under this heading would be where a taxpayer makes a claim based on falsified invoices and enquiries reveal that he or she directed an employee to alter documents. If the taxpayer later counselled the employee to deny to officers conducting enquiries that the documents had been altered the offence would be compounded.

(v) The taxpayer has been previously involved in tax evasion. The rate of the additional "culpability" component will depend on whether the evasion was considered deliberate or not and the extent and number of previous offences. For example, a situation where a substantial omission, considered deliberate, is detected, and the taxpayer has been the subject of a previous audit in recent years that also revealed substantial understatements, would attract a high "culpability" component.

Where serious breaches of the kind referred to in this or the previous paragraph are detected, consideration should be given to referring such cases for possible prosecution action in accordance with the prosecution case referral guidelines. IT 2246 provides additional guidelines in this regard.

Relevant commercial, academic or practical experience

45. In terms of the principle that the culpability of a taxpayer's actions is a function of the reason for or motivation of his or her actions, the level of education of the taxpayer or the possession of commercial knowledge and/or practical experience is not a decisive factor. It is relevant, however, in reaching any judgment as to whether or not the action was, for example, deliberate or inadvertent. The onus of proof on a registered tax agent to succeed in any claim that a false or misleading statement or omission of income was due to a genuine misunderstanding of the requirements of the application of the law would be greater than that of a person lacking in commercial skills, experience and/or knowledge of taxation law.

Level of Taxpayer Co-operation

46. It should be noted that the "culpability" component ranges suggested as applicable in certain circumstances (see chart at paragraph 41), assume a reasonable level of co-operation by the taxpayer (and his or her tax agent) during the conduct of an

audit. The "culpability" component may, however, be affected by the level of co-operation of the taxpayer or his or her agent.

. Reasonable Co-operation

47. In general terms, reasonable co-operation amounts to-

- a taxpayer answering all relevant and reasonable questions, whether orally or in writing, truthfully and to the best of his or her ability; and

- the timely provision of books and records having regard to the particular taxpayer's circumstances.

48. Reasonable co-operation does not require that a taxpayer agree with a tax officer's views. What it requires is the timely provision of information, not acceptance of a particular interpretation of that information. A taxpayer is entitled to put his or her case. An action such as a taxpayer indicating that a particular appointment time is not convenient should not, of itself, be taken to indicate a lack of co-operation. A taxpayer's refusal to answer questions or provide documents on the ground of legal professional privilege should not be taken as a lack of co-operation except where the claim of privilege is clearly not genuine.

. Less than Reasonable Co-operation

49. Factors contributing to less than reasonable co-operation would include-

- lack of co-operation which has caused undue/excessive delay in the completion of official enquiries;

- resort to delaying tactics;

- failure to attend an interview without due excuse; or

- failure to adhere to appointments.

As indicated in paragraphs 43(b) and 44(ii), an additional "culpability" component may be warranted where one or more of these elements is present.

. Positive Co-operation

50. The "culpability" component should be reduced where a taxpayer's conduct has actually assisted the task of the auditor, i.e., the taxpayer, and if applicable, his or her tax agent, has been more than reasonably co-operative. The introduction of this feature is not intended to, nor should it be construed so as to, dissuade a taxpayer from exercising his or her legal rights or from contesting an assessment or maintaining an opinion contrary to that of the tax officer. It is a genuine attempt to encourage a taxpayer to disclose a known error or omission which may or may not be the subject of an audit. It should be noted, however, that the fact that a

taxpayer merely "comes clean" when caught is not a basis for further remission of the statutory additional tax.

51. 'Positive co-operation' would be present where, after commencement of an audit, a taxpayer "voluntarily" admits to an omission of income/incorrect claim for deduction, rebate, etc., and brings to light additional information to enable the auditor to make a judgment that the disclosure is reasonably complete and the admission has resulted in a relatively significant saving in time and resources in completion of the audit.

52. In deciding the extent to which penalty will be remitted for 'position co-operation', the authorised officer should have regard to the extent to which time and resources in completion of the audit have been saved.

Tax Agent Error in a Taxpayer's Return

53. A large number of taxpayers retain the services of a tax agent for the purpose of preparing and lodging their taxation returns. Irrespective of whether the taxpayer's return has been agent prepared or not, a taxpayer is under a duty of care to ensure the contents of his or her return are correct. Under subsection 223(1), it is the taxpayer who is liable to additional tax for a false or misleading statement in his or her taxation return.

54. While a taxpayer may rely on section 251M or other legal remedies in cases where a false or misleading statement is caused by tax agent negligence, it is often very difficult to determine whether or not the agent has in fact been negligent. The question then arises as to the extent to which an error by an agent should be taken into account in determining the level of the "culpability" component.

55. The guidelines for remission of subsection 223(1) additional tax in agent prepared cases are essentially similar to those applicable to taxpayers generally. Where the agent error in a taxpayer's return is due, for example, to inadvertence or carelessness or more serious reasons, the level of the "culpability" component should be equated with the seriousness of the circumstance in the same way as if the false or misleading statement or omission had been made by the taxpayer personally.

56. Where a taxpayer's return contains a false or misleading statement that has arisen through an inadvertent error or honest mistake of his or her tax agent, e.g., transposition error by a staff member, and the only fault to be personally attributed to the taxpayer was the failure on his or her part to identify and correct the error or mistake made by the agent, then that is a factor to be taken into account when remitting the statutory additional tax. Although each case is to be considered on its merits, in general terms, where an inadvertent error or honest mistake on the part of the tax agent is involved, the "culpability" component should generally be limited to a maximum of 5% of the tax avoided in the same way as if it had been made by the taxpayer. Genuine problems existing in the tax agent's

office (at the time of preparing the taxpayer's return) may also be taken into account for the purpose of remitting penalty. A number of errors may, however, indicate a degree of carelessness, in which case, it would be appropriate to consider a "culpability" component in the less serious cases of the order of 5-15 per cent of the tax avoided. On the other hand, serious or blatant cases of carelessness or recklessness, e.g., a failure on the part of the agent to obtain requisite information from the taxpayer, or instances where there is collusion between the taxpayer and his or her agent, should be dealt with severely. Consideration should be given to the referral of such cases, or cases where 'inadvertent' errors or omissions by a particular agent are encountered on a number of occasions, to the Audit prosecution unit and/or the relevant Tax Agent's Board.

Income Disclosed in Another Return

57. In some cases, assessable income will have been included by a taxpayer in a year later than the year in which it was correctly assessable and, as a consequence, tax will have been avoided in the year of income in which the income should have been returned. The same outcome would also arise where a taxpayer's assessable income has been incorrectly included in another taxpayer's return.

(i) Income of a taxpayer incorrectly included in another taxpayer's return (in the same year of income).

58. For remission purposes, where, in the correct tax year, income of a taxpayer (A) has been incorrectly included by another taxpayer (B) and in overall terms no tax has been avoided, for example, because the same rates of tax apply to the assessments in question, then, notwithstanding that there has been an omission of income in A's return (automatically attracting section 223 additional tax), the statutory additional tax should be fully remitted.

59. In similar circumstances, but where some tax has been avoided in overall terms, for example, because of the operation of lower tax rates on B, any penalty by way of additional tax should be calculated in accordance with the general remission guidelines. However, the additional tax calculation should be based on the net tax avoided in overall terms.

(ii) Income incorrectly disclosed in a subsequent year.

60. For remission purposes, where the income of a taxpayer has been incorrectly disclosed in a subsequent year, the effect on the Revenue will be that some part or all of the tax applicable to that income item will have been deferred to the later period or avoided altogether.

61. Where the payment of tax has only been deferred (i.e., no tax avoided in overall terms), it would be appropriate to impose only the "per annum" component on the tax deferred. However, if the taxpayer was aware of the requirements of the proper tax treatment, it would be appropriate to consider imposing a

"culpability" component in addition to the "per annum" component.

62. Where the deferral of income results in some avoidance of tax in overall terms, for example, where the income of a company is deferred to take advantage of a lower rate of company tax applicable in a subsequent year, two "per annum" calculations are required -

(a) the first calculation is the per annum rate applied to the amount of tax originally assessed in respect of the income deferred to the later year for the relevant period involved in that deferment (i.e., period between the due dates of the relevant years' assessments - usually one year);

(b) the second calculation is the per annum rate applied to the amount of tax avoided by the deferment to a lower-taxed year for the relevant period involved in that deferment (i.e., the period between the due date of the assessment for the correct year of income and the date when the position is reached where a correct (amended) assessment is able to be made).

63. If a "culpability" component applies, that will involve a third calculation applying that rate to the amount of tax avoided by the deferment to the lower-taxed year.

64. The concessional basis outlined in the paragraphs above is not intended to apply in cases which, in effect, amount to permanent deferrals of income, e.g., stock valuations, reserves, provisions.

Sections 108 and 109 - Deemed Dividends

65. Private companies and their shareholders are taxed under the Act separately on their respective taxable incomes. In circumstances where section 108 or 109 has been applied, with the effect that a payment or credit is deemed to be a dividend paid by a company, the application of section 223 and the guidelines to the company and to associated persons should be considered separately.

66. The first question for decision in each case is whether subsection 223(1) applies to the particular adjustment being made. Where a payment made by a company is deemed to be a dividend in terms of section 108 or section 109, with the effect that the company is denied a deduction to which it would otherwise have been entitled or omitted income of the company is included in its assessable income, and there has not been a disclosure of all material facts, section 223 applies and the guidelines should be followed. Insofar as associated persons are concerned, many of the payments which are the subject of an opinion formed under section 108 or section 109 are, by their very nature, clearly assessable in the hands of recipients prior to, and apart from, their being deemed dividends. In the case of section 109 type payments it is clear that they would ordinarily be assessable to the taxpayer in terms of subsection 25(1) or,

for example, Subdivision AA of Division 2 of Part III which deals with eligible termination payments. Similarly, there would be payments which, prior to the application of section 108, would be assessable income under other sections of the Act, e.g., subsections 25(1), 26(e) or 44(1).

67. If a payment or credit which is the subject of section 108 or 109 consideration should, apart from those provisions, have been returned as assessable income in the form of salary /wages, dividends, eligible termination payments, etc., but has not in fact been returned, then the omission is one to which section 223 applies.

68. Where there has been a false or misleading statement or income omission by both the company and the associated person in relation to the same matter, section 223 is attracted in each case.

69. Where the character of the payment is such that, but for it having been deemed a dividend, it would have been non-assessable (e.g., a loan or advance to a shareholder who was not also an employee of the company) or assessable as to part only and the amount is deemed a dividend after lodgment of the recipient's return, it is considered that section 223 does not apply because it cannot be said the taxpayer omitted the deemed dividend from his or her return.

Same controlling mind : company and associated person

70. The principles embodied in the remission guidelines are that culpability should be related to the actions of each particular taxpayer.

71. It is recognised that on occasions, the policy adopted in the remission guidelines can operate harshly if applied separately to the company and to an associated person. This is particularly so in view of the absence of any imputation credit in the hands of the associated person.

72. The more common situations encountered are those where, for example, adjustments in terms of section 108 are required to be made to the taxable income of an associated person who is the directing mind or will of the company and the major principal behind its decisions. It is often this person who stands to obtain the greater benefit from avoidance of tax by the company. In such cases it is considered that the principal penalty should be imposed on that person particularly where other shareholders are not deemed to have received dividends pursuant to section 108 or 109. In this way "innocent" parties are not indirectly penalised through a reduction in the net worth of the company brought about by the imposition of a "culpability" component of a penalty on the company.

73. Ordinarily, therefore, where an associated person is both the principal shareholder and directing mind or will of the company and is deemed to have been paid a dividend pursuant to section 108 or 109, penalty in accordance with these guidelines (i.e.,

"culpability" plus "per annum" component) should be imposed on that person. A "per annum" component only should be imposed on the company.

74. In some circumstances, it may be preferable in the alternative, to impose the appropriate "culpability" component on the company. In determining whether, in addition to the "per annum" component, a "culpability" component should be imposed on the associated person or the company, authorised officers should consider:

- the financial position of the associated person, and the company;
- the effect that a "culpability" component imposed on the company may have on "innocent" shareholders/associated persons;
- the circumstances that gave rise to the deemed distribution; and
- the extent and seriousness of the actions of the company and/or the associated persons in producing the deemed distribution.

Losses Carried Forward

75. Section 223 may apply even though a false or misleading statement made on or after 14 December 1984 does not relate to the same income year in which tax is avoided. Subsection 223(1) additional tax is imposed in the year in which the false or misleading statement or omission has a tax effect.

76. In the case of carried-forward losses, an audit in a subsequent year may reveal that a loss originally claimed on or after 14 December 1984 was based on a false or misleading statement. In such a case, although the false or misleading statement will ordinarily have been made in the year in which the loss was made (i.e., the year in which the loss was deemed to have been incurred), subsection 223(1) will have the effect of imposing additional tax in the year(s) in which the loss brought forward is recouped against income and tax is avoided.

Calculation of the "Per Annum" Component

77. The "per annum" calculation should be based on the period from the due date for payment of the relevant assessment (30 days after the issue date of a notice in a refund or non-taxable case) to the date when the position is reached where a correct assessment is able to be made. In some cases this will be the date of settlement with or acceptance by the taxpayer of the proposed adjustment. In others, such as straight forward voluntary admission or dividend/interest cases, it should be the date by which all relevant information necessary to raise the assessment, including the information necessary to determine the appropriate rate of additional tax, has been made available by the taxpayer.

78. In calculating the "per annum" component, the taxpayer should not be penalised for delays caused by the ATO. Nor should the Revenue be disadvantaged by any deferment of the issue of an assessment requested by the taxpayer. This may occur, for example, in the Large Case Program where, at the request of the management of a taxpayer group, assessments are deferred until the completion of the audit of the group. If, in the ATO's view, the issue of a correct assessment is able to be made at an early date, but it is deferred at the taxpayer's request, then the tax avoided plus the additional tax calculated to the date on which the ATO considers a correct assessment was able to be made, should be subject to a "per annum" component calculated to the date the assessment is eventually made. Naturally, the additional section 223 penalty tax, when added to the section 223 additional tax calculated as at the date the correct assessment was capable of being made, should not exceed the statutory maximum of 200% of the tax avoided. To illustrate the calculation involved, the following example is provided -

- ATO undertakes large case audit of taxpayer.

- At commencement of audit the taxpayer requested, and ATO agreed, that the issue of any amended assessments be deferred until completion of the group audit which in fact occurs on 31 December 1989.

- In respect of the year of income under investigation, i.e., 85/86, the audit revealed tax avoided of $100,000.

- A "culpability" component of 30% of the tax avoided was imposed, in addition to the "per annum" component.

- The original assessment issued say on 1 December 1986. The amended assessment would ordinarily have issued on 1 January 1989.

Calculation where correct assessment could have been issued on 1 January 1989

Tax avoided + (tax avoided x p.a. comp x 3 years) + (tax avoided x culp. component)
= $100,000 + (100,000 x 14.026% x 3) + (100,000 x 30%)
= $100,000 + (42,078 + 30,000)
= $100,000 tax avoided + $72,078 addit. tax
Total tax payable = $172,078

If correct assessment deferred to 31 December 1989

(Tax avoided + s.223 addit. tax (as at 1 Jan. 1989)) x p.a.
= ($100,000 + 72,078) x 14.026% p.a.
= $172,078 x 14.026% p.a.
= $24135.66 further s.223 additional tax payable

Total tax payable = $100,000 tax avoided, plus
$ 72,078 addit. tax previously payable, plus

	$ 24,135.66	further s.223 additional tax on tax avoided + s.223 addit. tax previously payable
Total tax payable	$196,213.66	

Note : Total s.223 addit. tax equals :
72,078 conditionally payable
24,135.66 further additional tax for period that issue of assessment has been delayed

$96,213.66 which is well within the statutory maximum of 200% of the tax avoided i.e. 200% of $100,000 = $200,000

79. With the exception of previously assessed non-taxable cases, the "per annum" component will not apply in original assessments. However, the imposition of a "culpability" component may be warranted depending on the circumstances.

Advance Payments

80. The "per annum" component is intended to compensate the Revenue for the full amount of tax not having been paid by the due date. Therefore, the fact that a taxpayer has paid all or some of the tax avoided prior to the relevant date determined in accordance with paragraphs 77-78 should be taken into account in the calculation of the "per annum" component.

Remission of the "Per Annum" Component

81. Any remission of the "per annum" component should be made in only exceptional circumstances. Generally, reduction of the "per annum" component would only be warranted where -

- a taxpayer makes a voluntary disclosure ("per annum" component should generally be reduced to 10% - see paragraphs 21 and 22);
- a taxpayer did not know and could not be expected to know that a statement in his or her return was false or misleading or that income had been omitted (the "per annum" component should be reduced to NIL - see paragraphs 37 - 41);
- a taxpayer has been genuinely misled by actions of the ATO (the "per annum" component should be reduced to NIL - see paragraphs 37 - 41);
- a taxpayer made an understatement of taxable income which resulted from an interpretation of the law adopted by him or her for which there was judicial or quasi-judicial authority at the time of lodgment of the return - and the statement made in the return is

misleading in only a minor particular. IT 2444 provides guidelines concerning the level of remission of section 170AA interest in such cases. The same criteria should be followed when determining whether, and to what extent, the "per annum" component of the section 223 additional tax calculation should be reduced.

Financial hardship

82. The guidelines for remission outlined above have generally been concerned with examining those reasons or factors (aggravating or mitigating) which have contributed to the taxpayer making a false or misleading statement.

83. Where known, another factor which may be considered by authorised officers is the taxpayer's capacity to pay. Officers should consider the effect of the subsection 223(1) additional tax having regard to the taxpayer's net assets and potential earning or borrowing capacity.

84. Where the authorised officer is satisfied the level of additional tax determined in accordance with the guidelines outlined elsewhere in this ruling would cause serious financial hardship for the taxpayer, further remission of additional tax may be warranted. The extent of any further remission will depend entirely on the facts in each case.

Settlements

85. As a matter of general principle and to the greatest extent possible, additional tax raised in accordance with the guidelines should be regarded as non-negotiable. However, it is recognised that, in a small minority of cases, there is no practicable alternative to settlement other than on the basis of additional tax. Reasonable compromise in cases where there is doubt as to quantum/taxability/deductibility of an income/expenditure or rebate item may be justified in such cases. However, it is considered that, wherever possible, negotiation should be on the basis of the adjustment rather than additional tax.

86. There would need to be compelling reasons for settling a case by reducing the additional tax where the correctness of the adjustments is not open to doubt. Reductions of additional tax on the grounds of expediency or the cost of pursuing a case are not acceptable. Where negotiation on the basis of additional tax is absolutely necessary, there being genuine doubt as to quantum or taxability, etc., any remission of additional tax should not extend to the "per annum" component.

Calculation of the Tax Avoided

87. The following paragraphs outline the general basis on which subsection 223(1) additional tax should be calculated when exercising the Commissioner's discretion under subsection 227(3) to remit the statutory additional tax.

88. Subsection 223(1) requires that additional tax be based on the tax that would have been avoided as a result of each false or misleading statement.

89. In the course of an audit, an auditor might detect a number of false or misleading statements; debit adjustments which do not attract additional tax under section 223 (but do attract interest under section 170AA); and credit adjustments which may or may not be related to the false or misleading statements or the amounts to which section 170AA applies. Adjustments entirely unrelated to either the false or misleading statements or a non-penalisable amount could also be detected.

90. As a first step in the calculation of additional tax, there must be a recalculation of the taxable income and the tax payable thereon. The general procedure to be adopted is as follows:

- credit items (i.e., adjustments to taxable income in the taxpayer's favour) which are unrelated to the false or misleading statements or to the amounts attracting section 170AA interest should be deducted from the taxable income as returned/assessed;

- deduct related credit adjustments from the false or misleading statements, and similarly, deduct related credit adjustments from non-penalisable amounts;

- the amounts determined should be added to the adjusted taxable income as returned/assessed and in this way the tax avoided determined.

91. The examples appearing below serve to illustrate the calculations involved and the amounts to which subsection 223(1) and section 170AA would respectively apply. In calculating tax payable in the following examples, rates of tax applicable to resident individual taxpayers for 1987/88 have been used. In determining the amount of the "excess" under section 223 and, if applicable, the amount to which section 170AA applies, it is necessary to take into account the effect of any imposition or increase in the Medicare levy arising as a result of an increase in a person's taxable income. For the purposes of section 223 and section 170AA, "tax" includes levy payable in accordance with Part VIIB : Subsection 251R(7). However it should be noted that for the purpose of simplifying the following examples the effect of the Medicare levy has been ignored.

EXAMPLE A

TAXABLE INCOME AS RETURNED / ASSESSED	(TIAR/A)	20,000
FALSE / MISLEADING STATEMENT	(F/M)	10,000
NON PENALISABLE DEBIT	(NPD)	-
CREDIT RELATED TO F/M	(CRFM)	-

CREDIT RELATED TO NPD		(CRNPD)	-
UNRELATED CREDIT		(UC)	-
TIAR/A			20,000
Less UC			-
			20,000
NPD	-		
Less CRNPD	-	-	
FM	10,000		
Less CRFM	-	10,000	
Net debit adjustment			10,000
Amended Taxable Income (ATI)			30,000
Tax Avoided			
Tax on ATI	30,000		8,001
Less			
Tax on TIAR/A	20,000		4,001
TAX AVOIDED		(s.223)	4,000

EXAMPLE B

TAXABLE INCOME AS RETURNED / ASSESSED		(TIAR/A)	20,000
FALSE / MISLEADING STATEMENT		(F/M)	10,000
NON PENALISABLE DEBIT		(NPD)	-
CREDIT RELATED TO F/M		(CRFM)	4,000
CREDIT RELATED TO NPD		(CRNPD)	-
UNRELATED CREDIT		(UC)	-
TIAR/A			20,000
Less UC			-
			20,000
NPD	-		
Less CRNPD	-	-	
FM	10,000		
Less CRFM	4,000	6,000	
Net debit adjustment			6,000
Amended Taxable Income (ATI)			26,000
Tax Avoided			
Tax on ATI	26,000		6,401

Less			
Tax on TIAR/A	20,000		4,001
TAX AVOIDED	(s.223)		2,400

EXAMPLE C

TAXABLE INCOME AS RETURNED / ASSESSED	(TIAR/A)		20,000
FALSE / MISLEADING STATEMENT	(F/M)		10,000
NON PENALISABLE DEBIT	(NPD)		-
CREDIT RELATED TO F/M	(CRFM)		12,000
CREDIT RELATED TO NPD	(CRNPD)		-
UNRELATED CREDIT	(UC)		-
TIAR/A			20,000
Less UC			-
			20,000
NPD	-		
Less CRNPD	-	-	
FM	10,000		
Less CRFM	12,000	(2,000)	(2,000)
Amended Taxable Income (ATI)			18,000

As the ATI is less than the TIAR/A no tax has been avoided and no penalty should be imposed.

EXAMPLE D

TAXABLE INCOME AS RETURNED / ASSESSED	(TIAR/A)		20,000
FALSE / MISLEADING STATEMENT	(F/M)		10,000
NON PENALISABLE DEBIT	(NPD)		6,000
CREDIT RELATED TO F/M	(CRFM)		-
CREDIT RELATED TO NPD	(CRNPD)		2,000
UNRELATED CREDIT	(UC)		-
TIAR/A			20,000
Less UC			-
			20,000
NPD	6,000		
Less CRNPD	2,000	4,000	

FM	10,000		
Less CRFM	-	10,000	
Net debit adjustment			14,000
Amended Taxable Income (ATI)			34,000

TAX AVOIDED

Tax on ATI	34,000	9,601
Less		
Tax on TIAR/A	20,000	4,001
TAX AVOIDED		5,600

ALLOCATION OF TAX AVOIDED TO F/M & NPD

F/M

10,000 / 14,000 x 5,600 = 3,999

NPD

4,000 / 14,000 x 5,600 = 1,599

TAX AVOIDED (S.223) = 3999 (S.170AA) = 1599

EXAMPLE E

TAXABLE INCOME AS RETURNED / ASSESSED	(TIAR/A)	20,000
FALSE / MISLEADING STATEMENT	(F/M)	10,000
NON PENALISABLE DEBIT	(NPD)	-
CREDIT RELATED TO F/M	(CRFM)	-
CREDIT RELATED TO NPD	(CRNPD)	-
UNRELATED CREDIT	(UC)	7,000

TIAR/A			20,000
Less UC			7,000
			13,000
NPD	-		
Less CRNPD	-	-	
FM	10,000		
Less CRFM	-	10,000	
Net debit adjustment			10,000
Amended Taxable Income (ATI)			23,000

TAX AVOIDED

Tax on ATI	23,000	5,201
Less		
Tax on TIAR/A	20,000	4,001
TAX AVOIDED (S.223)		1,200

EXAMPLE F

TAXABLE INCOME AS RETURNED / ASSESSED	(TIAR/A)		20,000
FALSE / MISLEADING STATEMENT	(F/M)		10,000
NON PENALISABLE DEBIT	(NPD)		-
CREDIT RELATED TO F/M	(CRFM)		-
CREDIT RELATED TO NPD	(CRNPD)		-
UNRELATED CREDIT	(UC)		12,000

	TIAR/A		20,000
	Less UC		12,000
			8,000
	NPD	-	
	Less CRNPD	-	-
	FM	10,000	
	Less CRFM	-	10,000
Net debit adjustment			10,000
Amended Taxable Income (ATI)			18,000

As the ATI is less than TIAR/A
no tax has been avoided and no penalty
should be imposed.

EXAMPLE G

TAXABLE INCOME AS RETURNED / ASSESSED	(TIAR/A)	Loss	(4,000)
FALSE / MISLEADING STATEMENT	(F/M)		6,000
NON PENALISABLE DEBIT	(NPD)		-
CREDIT RELATED TO F/M	(CRFM)		-
CREDIT RELATED TO NPD	(CRNPD)		-
UNRELATED CREDIT	(UC)		-

	Loss as returned		(4,000)
	Add UC		-
			(4,000)
	NPD	-	
	Less CRNPD	-	-
	FM	6,000	
	Less CRFM	-	6,000
Net debit adjustment			6,000
Reassessed Taxable Income (RTI)			2,000

TAX AVOIDED

Tax on RTI	2,000	NIL *
Less		
Tax on loss as Returned	(4,000)	NIL
TAX AVOIDED (S.223)		NIL

* Assumes taxpayer is a natural person.

EXAMPLE H

TAXABLE INCOME AS RETURNED / ASSESSED	(TIAR/A)		20,000
FALSE / MISLEADING STATEMENT	(F/M)		10,000
NON PENALISABLE DEBIT	(NPD)		15,000
CREDIT RELATED TO F/M	(CRFM)		-
CREDIT RELATED TO NPD	(CRNPD)		-
UNRELATED CREDIT	(UC)		-
TIAR/A			20,000
Less UC			-
			20,000
NPD	15,000		
Less CRNPD	-	15,000	
FM	10,000		
Less CRFM	-	10,000	
Net debit adjustment			25,000
Amended Taxable Income (ATI)			45,000

TAX AVOIDED

Tax on ATI	45,000	14,901
Less		
Tax on TIAR/A	20,000	4,001
TAX AVOIDED		10,900

ALLOCATION OF TAX AVOIDED TO F/M & NPD

F/M

10,000 / 25,000 x 10,900 = 4360

NPD

15,000 / 25,000 x 10,900 = 6540

TAX AVOIDED (S.223)	(S.170AA)
= 4,360	= 6,540

EXAMPLE I

TAXABLE INCOME AS RETURNED / ASSESSED	(TIAR/A)	20,000
FALSE / MISLEADING STATEMENT	(F/M)	10,000

NON PENALISABLE DEBIT		(NPD)		6,000
CREDIT RELATED TO F/M		(CRFM)		1,000
CREDIT RELATED TO NPD		(CRNPD)		500
UNRELATED CREDIT		(UC)		2,000
	TIAR/A			20,000
	Less UC			2,000
				18,000
	NPD	6,000		
	Less CRNPD	500	5,500	
	FM	10,000		
	Less CRFM	1,000	9,000	
Net debit adjustment				14,500
Amended Taxable Income (ATI)				32,500
TAX AVOIDED				
Tax on ATI	32,500	9,001		
Less				
Tax on TIAR/A	20,000	4,001		
TAX AVOIDED		5,000		

ALLOCATION OF TAX AVOIDED TO F/M & NPD

F/M

9,000 / 14,500 x 5,000 = 3,103

NPD

5,500 / 14,500 x 5,000 = 1,896

TAX AVOIDED (S.223)	(S.170AA)
= 3,103	= 1,896

EXAMPLE J

TAXABLE INCOME AS RETURNED / ASSESSED		(TIAR/A)	20,000
FALSE / MISLEADING STATEMENT due to deliberate evasion & aggravating factors	NO.1	(F/M NO.1)	6,000
FALSE / MISLEADING STATEMENT due to inadvertence	NO.2	(F/M NO.2)	500
NON PENALISABLE DEBIT		(NPD)	1,500
CREDIT RELATED TO F/M	NO.2	(CRFM2)	200
CREDIT RELATED TO NPD		(CRNPD)	-
UNRELATED CREDIT		(UC)	400

TIAR/A				20,000
Less UC				400
				19,600
NPD		1,500		
Less CRNPD		-	1,500	
FM NO.1	6,000			
Less CRFM NO.1	-	6,000		
FM NO.2	500			
Less CRFM NO.2	200	300	6,300	
Net debit adjustment				7,800
Amended Taxable Income (ATI)				27,400

TAX AVOIDED			
Tax on ATI	27,400	6,961	
Less			
Tax on TIAR/A	20,000	4,001	
TAX AVOIDED		2,960	

ALLOCATION OF TAX AVOIDED TO F/M & NPD

F/M NO. 1	F/M No.2	NPD
6,000 x 2,960	300 x 2960	1,500 x 2,960
7,800	7,800	7,800
= 2,276	= 113	= 569

F/M No.1 due to deliberate evasion + agg. factor warranting, collectively, say 60% "culpability" component.

F/M No.2 due to inadvertence say 5% "culpability" component.

F/M No.1

S.223 additional tax
14.026% p.a. + 60% flat
= (0.14026 x 2,276) + (2,276 x .6)
= 319 + 1,365
= 1,684

F/M No.2

S.223 additional tax
14.026% p.a. + 5% flat
(0.14026 x 113) + (113 x .05)
= 15 + 5
= 20

Total S.223 additional tax = 1704 (i.e., 1684 + 20)

NPD

S.170 AA interest

14.026 / 100 x 569

= 79

Total S.170AA interest = 79

EXAMPLE K

TAXABLE INCOME AS RETURNED / ASSESSED (TIAR/A) 20,000

FALSELY CLAIMED REBATE	(FR) delib evasion		380
TIAR/A			20,000
Less UC			-
			20,000
NPD	-		
Less CRNPD	-	-	
F/M	-		
less CRFM	-	-	
			-
Amended Taxable Income	(ATI)		20,000

TAX AVOIDED

Falsely claimed rebate = $380
Auditor recommends remission
of section 223 additional
tax to 14.026% p.a. + 45% flat (delib. evasion)

S.223 ADDITIONAL TAX

(0.14026 x 380) + (0.45 x 380)
= 53 + 171
= 224

EXAMPLE L

TAXABLE INCOME AS RETURNED / ASSESSED		(TIAR/A)		40,000
FALSE / MISLEADING STATEMENT	NO.1	(F/M)	contentious	15,000
FALSE / MISLEADING STATEMENT	NO.2	(F/M)	carelessness	1,500
NON PENALISABLE DEBIT		(NPD)		4,000
CREDIT RELATED TO F/M	NO.1	(CRFM1)		4,500
CREDIT RELATED TO NPD		(CRNPD)		800
UNRELATED CREDIT		(UC)		6,000
FALSELY CLAIMED REBATE		(FR) misunderstanding		1,000

TIAR/A				40,000
Less UC				6,000
				34,000
NPD		4,000		
less CRNPD		800	3,200	
FM No.1	15,000			
less CRFM1	4,500	10,500		
FM No.2	1,500			
less CRFM2	-	1,500	12,000	
Net debit adjustment				15,200
Amended Taxable Income		(ATI)		49,200

TAX AVOIDED

Tax on ATI 49,200 =	16,959	
Less		
Tax on TIAR/A 40,000 =	12,451	4,508
Plus False Claimed Rebate		1,000
TAX AVOIDED		5,508

ALLOCATION OF TAX RELATING TO F/M No.1 + 2 + NPD + REBATE

FM NO.1	FM No.2	REBATE
ALLOCATION OF TAX AVOIDED		
10500 / 15,200 x 4508 = 3114	1500 / 15,200 x 4508 = 444	= 1000
DUE TO CONTENTIOUS ITEM	DUE TO CARELESSNESS	DUE TO MISUNDER-STANDING
s.223 additional tax	s.223 additional tax	s.223 add. tax
14.026%p.a. + Nil culp	14.026%p.a. + 20% culp	14.026%pa + Nil
0.14026 x 3114 = 436	(0.14026 x 444) + (0.20 x 444) = 62 + 88 = 150	0.14026 x 1000 = 140

Total S.223 additional tax = 726

NPD

3200 / 15,200 x 4508

= 949

S.170AA interest

14.026 / 100 x 949

= 133

Total S.170AA interest = 133

ATTACHMENT

EXAMPLES OF THE APPLICATION
OF REMISSION GUIDELINES

The following case examples are intended to provide an indication as to how the general remission guidelines outlined in this ruling may be applied having regard to the facts of the particular cases identified below. The decisions on the remission of penalty in the examples are

based on the particular circumstances of each case. Notwithstanding that similar features may be present in other cases, it should be clearly understood by all users of this document that each case must be dealt with on an individual basis having regard to the particular circumstances of the case under audit. To the extent possible, the auditor should give the taxpayer the opportunity to bring to attention any factual elements considered to be relevant to the case.

(i) Omission of income from one of a number of bank accounts - factors partly beyond taxpayer's control - innocent error - no prior offences.

FACTS

The taxpayer invested monies in savings accounts and term deposits with a number of banks, a finance company and four different building societies. She returned all interest derived from these institutions, with the exception of a single amount of interest derived from a building society. The amount of interest in question and the date on which it had been paid had been correctly recorded in the taxpayer's passbook but the transaction code used by the teller to record the payment of interest inaccurately described the payment. Other payments of interest made by the building society in the taxpayer's passbook in the current and in previous years had identified interest payments with transaction codes which more accurately described the nature of the payment.

The taxpayer had no prior offences. She had carefully and correctly returned all other interest derived from interest bearing deposits in the current and in previous years. Because of the transaction code the taxpayer had not realised the amount in question was interest. The building society advised that the code identifying the transaction was inaccurate.

CONCLUSION

Subsection 223(1) additional tax is attracted because the taxpayer has omitted assessable income from her return : subsection 223(7) refers.

DECISION ON REMISSION

The authorised officer considered that the taxpayer's omission was an innocent error where neither carelessness nor an intention to avoid tax was present. The statutory additional tax was remitted to the extent that the taxpayer was called on to pay the "per annum" component only.

(ii) Similar claims in subsequent years - incomplete disclosure - initial claims not allowable - no misrepresentation in initial claim.

FACTS

In a taxation return a taxpayer provides details in support of a claim that the cost of the purchase of a business suit is an allowable deduction in his capacity as a consultant engineer. The assessment issues on the basis of the return lodged. The taxpayer makes similar claims without full supporting details in subsequent returns, also the subject of an audit, on the basis that the initial claim has been accepted. The auditor noted that the basis of the claim had not changed in the later years.

CONCLUSION

The auditor concluded that the taxpayer's claim in the earlier return was not an allowable deduction. There had, however, been no misrepresentation in the original claim. The taxpayer had erred in assuming that his earlier claim had been accepted and, secondly, in not providing requisite particulars in relation to the latter year claims. Subsection 223(1) was automatically attracted in relation to the claims made in the later year returns.

DECISION ON REMISSION

The authorised officer accepted that the taxpayer had not intended to deceive the Commissioner in relation to the later year claims. The statutory additional tax was remitted to the extent that the taxpayer was called on to pay the "per annum" component only.

(iii) Understated separate net income - genuine misunderstanding of law - ambiguity in tax guide.

FACTS

The taxpayer claimed a spouse rebate in respect of his wife for the 1983 income year. His wife had worked for part of the 82/83 financial year and the income she received was sufficient to preclude a rebate from being allowed. In January 83, the taxpayer's spouse ceased work and for the rest of the year was dependent on the taxpayer. The taxpayer stated that in calculating the rebate claim he had relied on information provided in the

return form and the official related instructions issued by the ATO. The instructions contained the following statement:

> "Where a dependant derived a separate net income in excess of $285 during the period maintained by you, the maximum or part rebate otherwise allowable must be reduced."

In reliance on this statement, and especially the words "during the period maintained by you" the taxpayer disclosed as separate net income the amount derived by his wife during the period of dependency and not, as required, the amount derived during the whole of the fiscal year.

CONCLUSION

The taxpayer had understated his spouse's separate net income for the entire year of income. Subsection 223(1) additional tax was automatically imposed.

DECISION ON REMISSION

The authorised officer concluded that the taxpayer had genuinely misunderstood the application of the law, due to what could reasonably be accepted as an ambiguity in the return form and related instructions. Accordingly, the imposition of a "culpability" component was not warranted. In the result the "per annum" component only was imposed.

(iv) Newly established business - inadequate accounting records - carelessness.

FACTS

The tax return of a small, newly established business experiencing rapid growth was prepared from an inadequate and poorly supervised accounting system which had not kept pace with the firm's very fast expansion. An audit was conducted and several omissions of income (accounts for services rendered by the firm) were detected together with overstated claims for deductions. The amounts involved were small in relation to total income for the year. The services provided in these particular cases were unusual in nature when compared with the mainstream operations of the firm.

CONCLUSION

Having discussed the discrepancies with relevant employees including the working directors of the company, the auditor was satisfied that the errors

had not been deliberate but had come about because of poor record keeping. The auditor noted that a part time accounting clerk had recently been engaged to ensure that an appropriate accounting system was in place for the future. The auditor concluded that the taxpayer had been careless in not ensuring -

. that all assessable income derived by the firm had been included in the taxation return,

and

. that all claims for which a deduction had been sought were adequately analysed and checked.

A feature which added to the seriousness of the offence was the absence, at the time, of an appropriate accounting and recording and checking system, although remedial steps had since been taken by the taxpayer.

Having regard for the circumstances, the authorised officer considered that the penalty should include the following -

. the "per annum" component;

. a "culpability" component in the order of 22% (mid range of carelessness) in respect of the errors and omissions; and

. an additional "culpability" component for failure to keep proper records (see aggravating factor - para 44(iii)). The additional "culpability" component was limited to 5% only to acknowledge the steps since taken by the taxpayer to improve the accounting and supervisory system.

DECISION ON REMISSION

The statutory additional tax was remitted to the extent that the taxpayer was called on to pay the "per annum" component plus a "culpability" component of 27% (22 + 5) of the tax avoided.

(v) Contentious item - r & d expenditure - absence of case law

FACTS

The taxpayer claimed a deduction of $500,000 as expenditure on eligible research and development (r&d) activities under section 73B of the ITAA.

It was subsequently ascertained by the auditor that included in this amount was an allocation of overheads totalling $10,000. These overheads included canteen facilities and banking charges. The method adopted by the company for allocating the expenditure was accepted as being reasonable. The company believed that the expenditure came within the statutory requirement that it be "incurred directly in respect of r&d activities".

Relatively little guidance had been provided on interpretation of the legislation or of the type of expenses that came within the legislation. In addition, expenses on canteen facilities and bank charges had been allowable under the previous r&d incentive scheme.

That part of the r&d deductions relating to the canteen facilities and bank charges was disallowed as not being incurred directly in respect of r&d activities. There was no case law on the question although the authorised officer appreciated the taxpayer had some ground for its particular viewpoint.

CONCLUSION

The amounts claimed were considered to be not allowable. The presence of a non-allowable item in the overhead calculation which formed part of the general r&d claim gave rise to a statement which was misleading in a material particular : subsection 223(1) applied.

DECISION ON REMISSION

The authorised officer considered that in the circumstances the deductibility of the items was a contentious issue. The statutory additional tax was remitted to the extent that the taxpayer was called on to pay the "per annum" component only. A "culpability" component was not imposed because of the merits of the taxpayer's arguments; lack of specificity in the legislation; absence of clear guidelines on the application of the law to this particular area, and the newness of the relevant legislation.

(vi) Accrued interest - long term security - complex provisions - carelessness.

FACTS

The taxpayer invested $10,000 on fixed deposit for 3 years with a finance company on 1 August 198X. The terms of the investment were that interest was payable on maturity of the investment but would

accrue at a nominal interest rate of 13% per annum with 6 monthly rests. The taxpayer did not disclose in her return the amount of interest that had accrued for the period from 1 August 198X to the end of the year of income.

The finance company indicated in its prospectus that under the Income Tax Assessment Act, income accruing to investors from discounted and other deferred interest securities is taxed each year. It also informed investors of the amount to be included as assessable income for Division 16E purposes. The taxpayer stated she had not realised that income accruing on deferred interest securities was assessable as it accrues notwithstanding the advice received from the company. She believed interest was assessable only when it was received. The taxpayer was not commercially literate. She had not been penalised or prosecuted previously.

CONCLUSION

The omission of assessable income constitutes a false or misleading statement and attracts statutory additional tax: subsection 223(7) refers.

DECISION ON REMISSION

The authorised officer concluded that the omission was not the result of an intention to avoid tax. Some confusion may have genuinely arisen in the taxpayer's mind as to the assessability of the amounts in question. However, the taxpayer had been careless in ignoring the information provided by the finance company and in failing at least to make further enquiries or in raising the question of the assessability of the accrued interest in her taxation return. A "culpability" component of 15-30 per cent was in order. However, in view of the taxpayer's lack of commercial knowledge the lower end of the "culpability" range i.e., 15 per cent, was considered appropriate. The authorised officer also took account of the fact that the provisions of Division 16E of Part III are complex and the taxpayer's omission may have been occasioned in part by failure to properly understand the requirements of the law regarding assessability of accrued interest. The statutory penalty was remitted to the extent that the taxpayer was called on to pay the "per annum" component, plus a "culpability" component of 15 per cent of the tax avoided.

(vii) Repairs - misdescription - whether intentional or reckless - level of penalty where range applicable.

FACTS

The taxpayer, a company, carried on a significant exporting business and owned a warehouse in which it stored its stock. To comply with health and safety standards it was ordered by a maritime building authority to replace the existing rotting wooden floor of the warehouse. The wooden floor was entirely demolished and replaced with a steel and concrete floor which had distinct advantages over the old wooden floor. It reduced the likelihood of repair bills in the future. It resisted moisture build-up and thereby eliminated a problem which was a feature of the old floor. The taxpayer claimed a deduction for the cost of replacing the floor and for work associated with its replacement. The claim was said to be allowable pursuant to section 53 and was described as:

> "Repairs to warehouse floor, carpets and floor coverings including painting of surfaces".

The audit revealed that the claim included the cost of replacing carpets and tiles which were destroyed when the original floor was demolished and the cost of repainting walls and surrounding surfaces which had been damaged during removal and re-laying of the floor. It was not possible to treat the repainting separately from the main claim. The authorised officer determined that the replacement of the floor was in the nature of an alteration and improvement, and the expenditure, including associated expenditure, was of a capital nature.

CONCLUSION

After reviewing paragraphs 30-35 of IT 2141, the auditor concluded that the taxpayer had omitted from the claim matters without which the claim was misleading in a material particular. The taxpayer was thus liable for additional tax pursuant to subsection 223(1). In particular the taxpayer had failed to disclose that the floor in question had been replaced in its entirety by a floor of different and superior material. The taxpayer also failed to disclose the advantages which the replacement floor possessed over the original floor. These matters were materially relevant to the question of whether or not the expenditure was deductible pursuant to subsection 53(1). An explanation was sought by the auditor. A director of the company who was responsible for preparation of the company's tax return stated that, in

contrast to other claims made in the same return, details of the composition of the expenditure incurred in relation to the replacement floor and its added functions had not been provided because it was not considered those matters affected the question of whether the expenditure was or was not deductible. The director had no formal training in accounting or commercial law but possessed extensive commercial experience.

DECISION ON REMISSION

The authorised officer concluded that there was insufficient evidence of a deliberate intention to avoid tax but that the claim had been made recklessly. As well as the "per annum" component, a "culpability" component in the range of 30-40% was considered to be warranted. Further, the case was a serious case of recklessness and warranted a penalty in the upper end of the range. The taxpayer had failed to give diligent and careful consideration to the question of the proper characterisation of the expenditure and also failed to provide details that were materially relevant in deciding whether the expenditure constituted a deductible repair or a capital improvement. Statutory additional tax was remitted to the extent that the taxpayer was called on to pay a "culpability" component of 40% plus the "per annum" component as additional tax.

(viii) Sale within 12 months - intentional misdescription - section 26AAA (now repealed).

FACTS

On 20 September 1984, a taxpayer paid a $100 "holding deposit" to a real estate agent to secure a unit in a block of home units which were shortly to be constructed. On 10 January 1985, the taxpayer entered into a contract to purchase the unit and on 8 October 1985 on-sold the unit at a profit. The taxpayer's return identified the date of settlement, 14 April 1986, as the date of the sale of the property.

In considering whether sub-section 223(1) was attracted, and if so, to what extent the statutory additional tax should be remitted, the authorised officer gave particular attention to the following:-

. The taxpayer's return disclosed that the unit was acquired on 10 January 1985 as a rental investment and subsequently sold on 14 April 1986. It was said that the unit was sold to fund the acquisition of the freehold

shop from which the taxpayer's retailing business is conducted.

. The tax agent prepared the return on the basis of the information supplied by his client.

. On 8 October 1985, the taxpayer had signed a contract for sale of his interest in the unit. It was also established that on 21 October 1985 he paid the second deposit instalment (being a further 5% of the purchase price) under the contract of 10 January 1985.

CONCLUSION

The sale of the interest in the unit had in fact taken place within 12 months of acquisition and, therefore, section 26AAA applied. It was appropriate to include the profit on the sale of the unit in the assessable income of the taxpayer.

Subsection 223(1) is attracted because the taxpayer has made a misleading statement by omitting the date of the contract of sale.

Having regard to all the circumstances, the authorised officer was satisfied that this was not an innocent misrepresentation but a deliberate attempt to obscure the relevant issue.

DECISION ON REMISSION

In determining the extent to which the statutory additional tax warranted remission, the taxation officer sought an explanation as to why the date of the contract of purchase was thought to be the relevant date in respect of the purchase of the property, and the date of settlement was the relevant date of the sale of the property. No explanation was provided. It was noted, however, that the taxpayer had a similar dealing in the prior year in relation to a less profitable transaction which contract dates had been correctly disclosed.

In the circumstances, it was considered appropriate to remit the statutory additional tax to the extent that the taxpayer should be called on to pay a "culpability" component of 45 per cent of the tax avoided (plus the "per annum" component) as additional tax.

(ix) Trading Stock - understatement of value at year end - whether deliberate

FACTS

Enquiries made during the course of an audit revealed that a taxpayer held consignment stock on display in his premises together with stock purchased on normal terms.

Upon inspection of the taxpayer's records the auditor noticed that the purchases account was debited for the cost of the consignment stock and the various suppliers were treated as creditors. The taxpayer assured the auditor that, having taken up the consignment stock as a purchase, the items would be included in the year end stock sheets.

Examination of the stock sheets indicated this was not the case and, in fact, substantial amounts of stock purchased in the normal course of business had also been omitted from the stock sheets. Questioning of an employee indicated the taxpayer was aware the items were omitted from the stock sheets and that the value of stock at end in the accounts was understated.

The taxpayer claimed he had minimal knowledge of tax law and accounting practices and that the understatement of income arose out of his ignorance. However, from prior conversations with the taxpayer and considering the intricate business management systems the taxpayer had in place, the auditor considered that this was unlikely.

CONCLUSION

The understatement of the value of stock at end in the taxpayer's return constituted a false or misleading statement. Subsection 223(1) additional tax was automatically imposed.

DECISION ON REMISSION

The authorised officer concluded that the taxpayer had intended to understate his stock at end figure and therefore avoid tax. As his intentions were deliberate and he was aware of the consequences of his actions, it was considered that the penalty should be remitted under subsection 227(3) to an amount equivalent to a "culpability" component of 45% plus the "per annum" component.

(x) Capital Gains Tax - retailer - improvement - omission of material particulars - false statements at audit

FACTS

In 1984 the taxpayer purchased land and a building from which he carried on a retailing business. In February 1986 he added an additional storey to the building. This improvement cost $60,000. The taxpayer paid $40,000 of this amount from his business cheque account and $20,000 from his personal bank account. On 1 August 1987 the taxpayer sold the land and building for $500,000. In his tax return for the year ended 30 June 1988 the taxpayer stated the land was acquired prior to 19 September 1985 and had not been purchased with the intention of profit making by sale. At an audit the taxpayer advised he had enquired about the capital gains tax implications of the improvements to the building. He was informed the improvement would not be subject to capital gains tax (CGT) providing it did not cost more than $50,000. He stated that since the improvement only cost $40,000 it was not subject to CGT. The taxpayer failed to produce the personal bank account when requested to do so by the auditor. When confronted with the payment of $20,000 from his personal bank account the taxpayer admitted the transaction had been structured in this way to avoid tax. After allocating the sale proceeds of $500,000 between the original land and buildings and the improvement, the real gain on disposal of the improvement was subject to CGT.

CONCLUSION

The taxpayer's failure to disclose the capital gain accruing on disposal of the asset attracted the application of subsection 223(1).

DECISION ON REMISSION

The authorised officer concluded that the taxpayer had deliberately intended to avoid tax. A "culpability" component of 45% was in order. The making of further false statements during the course of the audit constituted an aggravating factor and as a result the "culpability" component was increased by a further 10%. The statutory additional tax was remitted to the extent that the taxpayer was called on to pay a "culpability" component of 55% of the tax avoided plus the "per annum" component.

(xi) Deliberate evasion - concealment - involvement of employees - less than reasonable co-operation

FACTS

The taxpayer leased several shops in which managers were appointed. The Taxation Office was

informed that in two of those shops the cash registers were closed off each day at a certain point in time and monies representing the proceeds of sales were set aside and collected by the taxpayer. These monies were never recorded in the taxpayer's financial accounts or returned as assessable income in his taxation return. This practice continued over a period of six years.

The taxpayer was interviewed and initially denied the practice existed. However, when confronted with a copy of a book showing these amounts, the taxpayer admitted that the omission of income in the manner alleged was correct. He insisted, however, the monies were used for cash purchases for the shops and were not claimed as deductions. This statement was subsequently shown to be false as the cash purchases had already been claimed as deductions.

CONCLUSION

The taxpayer had deliberately made false or misleading statements : statutory additional tax was automatically imposed : subsection 223(1).

DECISION ON REMISSION

As the facts disclosed a deliberate intention to avoid tax, a "culpability" component of 45% was in order. However, the presence of aggravating factors, viz, the involvement of employees in the evasion and the failure to answer questions honestly during the conduct of the audit with the intention of misleading the auditor increased the seriousness of the offence. These two elements warranted some addition to the 45% "culpability" component. The authorised officer considered that an increase in the "culpability" component of 12% and 8% respectively for the aggravating factors was appropriate having regard for all the circumstances in this case. A "culpability" component of 65% (i.e., 45 + 12 + 8) of the tax avoided plus the "per annum" component was imposed.

(xii) Hotel - understatement of taxable income - false deductions - deemed dividend (section 108) - non co-operation - aggravating factors - inadequate records.

FACTS

The taxpayer was a private company which owned a hotel. The managing director and principal shareholder of the taxpayer (70% of the issued shares) was the licensee and publican of the hotel. He had actual control of the running of

the business and managed its financial and taxation affairs and lodged its tax returns. In respect of the year in question the taxation return for the company lodged with the ATO disclosed a taxable income of $40,000. An audit of the taxpayer revealed it had significantly understated its income. It had omitted from its return $10,000 which represented the proceeds of the cash sales of beer and spirits. The cost of this stock had been claimed as a deduction by the company. The proceeds of these sales were appropriated by the managing director and used for private purposes. The taxpayer also made false claims for deductions for amounts in respect of wages paid to casual employees. It emerged that some of the employees in question were fictitious and that $9,000 of the total claim for "wages" for non-existent employees had been paid into the director's bank account.

These monies had also been used by him for private purposes. The minority shareholder was unaware of the misappropriations. The misappropriated funds of the taxpayer were deemed to be dividends pursuant to subsection 108(1) and therefore consequential adjustments to the managing director's taxation return, including imposition of additional tax, were required. In addition to the above, the company had in many respects failed to keep proper records or maintain an accounting system which would enable the income and expenditure of the business to be accurately determined. During the course of the audit the managing director had continued to try to conceal evidence of the avoidance of tax in relation to the above matters.

CONCLUSION

The taxpayer had clearly and deliberately intended to avoid tax. Such a conclusion would ordinarily give rise to a penalty of 45% "culpability", plus the "per annum" component. However, the falsification of accounting records, and a lack of co-operation constituted aggravating factors which warranted an increase in the "culpability" component. The managing director was directly responsible for the actions of the company in attempting to avoid tax. His personal involvement in this activity gave rise to no redeeming features in respect of the tax avoided by him.

DECISION ON REMISSION

After reviewing the financial position of the company, the effect that imposition of the "culpability" component would have on innocent

shareholders of the company, the circumstances that gave rise to the deemed distribution and the actions of the company and the associated person in producing the deemed distribution (paragraphs 65-74 refer), the auditor recommended that the principal penalty (i.e., the "per annum" component and "culpability" component) should be imposed on the associated person and that a "per annum" component only should be imposed on the company. The auditor recommended that with respect to the associated person the "culpability" component be increased by 25% for falsifying the records of the company in order to facilitate the avoidance of tax on his part, and a further 10% for failure to initially answer some questions honestly with the intention of deceiving the auditor. In the result the statutory penalty was remitted to the "per annum" component plus an 80% "culpability" component. A "per annum" component only was imposed on the company.

COMMISSIONER OF TAXATION
15 February 1989