MT 2008/1 - Penalty relating to statements: meaning of reasonable care, recklessness and intentional disregard

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Miscellaneous Taxation Ruling

Penalty relating to statements: meaning of reasonable care, recklessness and intentional disregard

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Preamble

This Ruling is a public ruling for the purposes of section 105-60 of Schedule 1 to the *Taxation Administration Act 1953* (TAA). This Ruling is also a public ruling for the purposes of Division 358 of Schedule 1 to the TAA.

If a statement in this ruling is later found to be incorrect or misleading and you make a mistake as a result of relying on this ruling, you will not have to pay any resulting underpaid tax nor will you have to pay any penalty. In addition, if you have relied on this ruling reasonably and in good faith you will not have to pay interest charges.

What this Ruling is about

1. This Ruling gives the Commissioner's interpretation of the concepts 'reasonable care', 'recklessness' and 'intentional disregard' as used in Subdivision 284-B of Schedule 1 to the *Taxation Administration Act 1953* (TAA). These concepts describe behaviour that can give rise to an administrative penalty under this Subdivision.

2. All legislative references in this Ruling are to Schedule 1 of the TAA unless otherwise specified.

3. This Ruling does not consider the guidelines for the exercise of the Commissioner's discretion to remit penalty otherwise attracted – see Law Administration Practice Statement PS LA 2006/2.

4. This Ruling also does not consider the methodology involved in calculating an administrative penalty where a shortfall amount needs to be split in order to apply different rates of penalty – see Taxation Ruling TR 94/3 which applied to former Part VII of the *Income Tax Assessment Act 1936* (ITAA 1936).

Date of effect

5. This Ruling is a public ruling for the purposes of section 105-60 and may be relied upon, both before and after its date of issue, by any entity to which it applies:

- Goods and Services Tax Ruling GSTR 1999/1 explains the goods and services tax (GST) rulings system and the Commissioner's view of when you can rely on GST public and private rulings; and

- Wine Equalisation Tax Ruling WETR 2002/1 explains the wine equalisation tax (WET) rulings system and the Commissioner's view of when you can rely on WET public and private rulings.

6. This Ruling is a public ruling for the purposes of Division 358 and may be relied upon, both before and after its date of issue. However, the Ruling will not apply to taxpayers to the extent that it conflicts with the terms of settlement of a dispute agreed to before the date of issue of the Ruling (see paragraphs 75 to 77 of Taxation Ruling TR 2006/10).

Previous Ruling

7. Taxation Ruling TR 94/4 was withdrawn with effect from the date of issue of draft Miscellaneous Taxation Ruling MT 2008/D1 on 14 May 2008.

Background

Legislative framework

8. The administrative penalty regime, which includes Division 284, applies from 1 July 2000 in relation to:

- income tax matters for the 2000-01 and later income years;
- for fringe benefits tax (FBT) matters for the year commencing 1 April 2001 and later years; and
- matters relating to other taxes for the year commencing 1 July 2000 and later years.

9. The regime sets out uniform administrative penalties that apply to entities that fail to satisfy certain obligations under different taxation laws.

10. The administrative penalty provisions consolidate and standardise the different penalty regimes that previously existed. In addition, the provisions apply in respect of various taxes and collection systems including income tax, FBT, GST and pay as you go withholding and instalments.

11. Division 284 imposes penalties where an entity:

- makes a statement which is false or misleading in a material particular – subsection 284-75(1);
- takes a position under an income tax law that is not reasonably arguable – subsection 284-75(2) (Miscellaneous Taxation Ruling MT 2008/2 explains the concept of reasonably arguable position);

- fails to provide a return, notice or other document to the Commissioner that is necessary to determine a tax-related liability, and the Commissioner determines the liability without the document – subsection 284-75(3);
- disregards a private ruling;[1] or
- enters into a scheme to get a scheme benefit – section 284-145.

12. Broadly, subsection 284-75(1) imposes a penalty where:

- an entity or its agent makes a statement to the Commissioner or to an entity that is exercising powers or performing functions under a taxation law;[2] and
- the statement is false or misleading in a material particular whether because of things in it or omitted from it; and
- there is a shortfall amount as a result of the statement.

13. However, the exception in subsection 284-215(2) means that there is no shortfall amount as a result of a false or misleading statement to the extent reasonable care was taken in making the statement.

14. An entity's agent, in this context, means someone who is authorised to represent the entity in making a statement to the Commissioner. An entity's agent, in this context, is not restricted to a registered tax agent.

15. A statement may be made or given in writing, orally or in any other way, including electronically. A statement may be made in correspondence, in a response to requests for information, in a notice of objection, in a request for an amendment to an assessment, in an answer to a questionnaire or in connection with an audit or investigation.

16. In the context of self assessment, where entities determine their own tax liabilities, a statement will include entering an amount or other information at a label or on an application, approved form, business activity statement, instalment activity statement, certificate, declaration, notice, notification, return or other document prepared or given under a taxation law.

17. Entering an amount at a label will generally be a statement of mixed fact and law in so far as it represents that the amount returned was, for example, received, expended or withheld and that the amount was the correct amount assessable, deductible or reportable as appropriate.

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[1] This penalty does not apply in relation to income tax matters for the 2004-05 and later income years, FBT matters for the year beginning on 1 April 2004 and later years, and matters relating to other taxes for the year beginning 1 July 2004 and later years.

[2] Under subsection 2(2) of the TAA an Excise Act (as defined in subsection 4(1) of the *Excise Act 1901*) is not a taxation law for purposes of Subdivision 284-B.

18. Items 1 and 2 of the table in subsection 284-80(1) list the circumstances relating to a false or misleading statement that give rise to a shortfall amount. Where one of those items applies, the shortfall amount is the amount by which a tax-related liability is less than, or a payment or credit is more than, it would have been if the false or misleading statement had not been made.

19. If an entity is liable to an administrative penalty under subsection 284-75(1), then under subsection 298-30(1) the Commissioner must make an assessment of the amount of penalty. This assessment is made in accordance with the formula described in section 284-85 as follows:

- calculate the base penalty amount under subsection 284-90(1); and
- increase (section 284-220) or decrease (section 284-225) the base penalty amount if certain conditions are satisfied.

20. The base penalty amount under subsection 284-90(1) for a penalty imposed under subsection 284-75(1) reflects the level of care taken by the entity or agent in making a false or misleading statement. Basically, the more culpable the behaviour leading to the shortfall amount, the higher the level of penalty.

21. Where the shortfall amount results from a failure to take reasonable care, the base penalty under item 3 of the table in subsection 284-90(1) is 25% of the shortfall amount. Where recklessness as to the operation of a taxation law results in the shortfall amount, the base penalty amount is 50% of the shortfall amount under item 2 of the table in subsection 284-90(1). A base penalty amount of 75% of the shortfall amount applies under item 1 of the table in subsection 284-90(1) if the shortfall amount results from intentional disregard of a taxation law.

22. The Commissioner is required under section 298-10 to provide an entity with written notice of any liability for an administrative penalty and the reasons why the entity is liable to pay the penalty. However, the Commissioner is not required to provide reasons where a decision is made to remit all of the penalty.

23. Under subsection 298-30(2) an entity that is dissatisfied with an assessment of penalty may object to it in the manner set out in Part IVC.

Former penalties regime

24. The concepts of reasonable care, recklessness and intentional disregard were used in sections 226G, 226H and 226J of the former penalties regime contained in Part VII of the ITAA 1936.[3] Also, under the penalties regime for false and misleading statements which predated the enactment of Part VII and self assessment, factors such as whether an entity had made an honest mistake, was careless, reckless or had engaged in deliberate evasion were relevant to the exercise of the Commissioner's discretion to remit the penalty that was automatically imposed.[4]

25. The former penalties regime contained in Part VII of the ITAA 1936 gave effect to the changes announced in the document *Improvements to self assessment – Priority Tasks, An Information Paper August 1991* circulated by the Honourable John Kerin, MP, Treasurer (the information paper). In moving from the old system that automatically imposed a high level of penalty subject to remission by the Commissioner, the information paper acknowledged that in a full self assessment environment that relies on voluntary compliance, entities need to have a clear understanding of the circumstances in which penalties for non-compliance will apply. Part VII of the ITAA 1936, like Part 4-25 of Schedule 1 of the TAA of the current law, achieved this by imposing penalties at prescribed rates for specific circumstances or categories of behaviour.

26. The information paper makes it clear that the threshold requirement in a full self assessment environment is that all entities exercise reasonable care in the conduct of their income tax affairs.

Ruling

Meaning of reasonable care

27. The expression 'reasonable care' is not a defined term and accordingly takes its ordinary meaning. *The Australian Oxford Dictionary*, 1999, Oxford University Press Melbourne, defines 'care' as '…**3** serious attention; heed, caution, pains' and 'reasonable' as '**3a** within the limits of reason; not greatly less or more than might be expected'. Taking 'reasonable care' in the context of making a statement to the Commissioner means giving appropriately serious attention to complying with the obligations imposed under a taxation law.

[3] Part VII of the ITAA 1936 does not apply to statements made in relation to the 2000-01 and later income years. It was repealed by *Tax Laws Amendment (Repeal of Inoperative Provisions) Act 2006*.
[4] Taxation Ruling IT 2517 set out the guidelines for remission under former subsection 227(3) of the ITAA 1936.

28. The reasonable care test requires an entity to take the same care in fulfilling their tax obligations that could be expected of a reasonable ordinary person in their position. This means that even though the standard of care is measured objectively, it takes into account the circumstances of the taxpayer. This aspect of the test is addressed in the Revised Explanatory Memorandum to the A New Tax System (Tax Administration) Bill (No. 2) 2000 where it states at paragraph 1.69:

> Reasonable care requires a taxpayer to make a reasonable attempt to comply with the provisions of the ITAA and regulations. The effort required is one commensurate with all the taxpayer's circumstances, including the taxpayer's knowledge, education, experience and skill.[5]

29. Judging whether there has been a failure to take reasonable care turns on an evaluation of all the circumstances surrounding the making of the false or misleading statement to determine whether a reasonable person of ordinary prudence in the same circumstances would have exercised greater care.

Parallels with the law of negligence

Factors taken into account in determining negligence

30. Although the concept of 'reasonable care' is not defined, the expression has a long history of usage in the context of tort law. A failure to exercise reasonable care in relation to conduct causing harm is central to proving negligence.

31. In proving negligence under the common law, the benchmark standard of care demanded of a person subject to a duty of care depends on what a reasonable person of ordinary prudence would have done or would not have done in response to a foreseeable risk of injury. This involves the application of an objective test generally without regard to the personal characteristics or idiosyncrasies of the person whose conduct is in question.[6] To this extent there is a difference between the test for proving negligence and determining whether reasonable care is shown in complying with tax obligations which does have regard to an entity's particular circumstances including their knowledge, education, experience and skill.

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[5] Refer to the proposals made in the information paper at paragraphs 2.7 to 2.12 (discussed in paragraph 25 of this Ruling) which were given effect to by the *Taxation Laws Amendment (Self Assessment) Act 1992*.

[6] A notable exception is someone with special knowledge or skill over and above what would ordinarily be expected of a reasonable person. Such a person must meet the standard of behaviour expected of a reasonable person with that special knowledge or skill.

32. Even though the personal circumstances part of the test for determining whether reasonable care is shown in complying with tax obligations is largely absent from the test applied in proving negligence, principles formulated by the courts to determine whether there has been a breach of the standard of care expected of a reasonable person give guidance to the meaning of the expression 'reasonable care' in Part 4-25. In particular, the factors that are taken into account by the courts in deciding whether behaviour is negligent are also relevant to making a decision about whether there is a liability to administrative penalty for a failure to take reasonable care.

33. Since the test for establishing negligence is objective, the actual intention of the person said to be at fault is not relevant. The fact that the person has tried to act with reasonable care is not the test – what is relevant is whether, on an objective analysis, reasonable care has been shown.

34. It follows that because an objective test also applies to determine whether reasonable care has been taken in making a statement to the Commissioner, the actual intentions of the entity are not relevant. This point is made in the information paper[7] at paragraph 2.8, where it explains that the reasonable care test means:

> …it is not a question of whether the taxpayer actually foresaw the impact of the act or failure to act, but whether a reasonable person in all the circumstances would have foreseen it. The test does not depend on the actual intentions of the taxpayer.

'Reasonable' does not connote highest level of care or perfection

35. Another important aspect of the reasonable care test that has a clear link to the principles applied in the law of negligence is that 'reasonable' does not connote the highest possible level of care or perfection. As Barwick CJ observed in *Maloney v. Commissioner for Railways (NSW)* (1978) 52 ALJR 292 at 292; (1978) 18 ALR 147 at 148 in considering whether the respondent had failed to take reasonable care for the safety of a passenger:

> …the respondent's duty was to take *reasonable* care for the safety of his passengers. It is easy to overlook the all important emphasis upon the word 'reasonable' in the statement of the duty. Perfection or the use of increased knowledge or experience embraced in hindsight after the event should form no part of the components of what is reasonable in all the circumstances. That matter must be judged in prospect and not in retrospect.

36. As the Revised Explanatory Memorandum to the A New Tax System (Tax Administration) Bill (No. 2) 2000 notes at paragraph 1.70:

> The reasonable care test is not intended to be overly onerous for taxpayers. For most taxpayers, an earnest effort to follow *TaxPack* instructions would usually be sufficient to pass the test.

[7] See paragraph 25 of this Ruling.

37. Also under the common law, the standard of care demanded of a reasonable person of ordinary prudence is not reduced to the level of the lowest common denominator. In the same way, although the test for determining whether reasonable care has been taken in the context of Part 4-25 is not overly onerous, meeting this test requires more than satisfying the lowest possible standard of care.

No penalty for a failure to comply with a law that is not a taxation law

38. It is only a failure to take reasonable care to comply with a taxation law that gives rise to an administrative penalty. The penalty regime therefore does not apply to a failure to take reasonable care to comply with obligations under laws that are not taxation laws. In *Jones v. Federal Commissioner of Taxation* [2003] AATA 84; 2003 ATC 2024; (2003) 52 ATR 1063 the entity had entered into a partnership that contravened the provisions of the *Professional Engineers Act 1988 (Qld)*. Although the Administrative Appeals Tribunal (AAT) found that this breach was attributable to a want of reasonable care, the shortfall amount was not a result of a failure to take reasonable care to comply with the ITAA 1936. Accordingly there was no liability to penalty under the former section 226G of the ITAA 1936 for a failure to take reasonable care to comply with that Act.

Differences between 'reasonable care' and 'reasonably arguable'

39. Unlike the reasonably arguable position test which focuses solely on the merits of the position taken, the reasonable care test has regard to the efforts taken by an entity or their agent to comply with their tax obligations. There is no personal circumstances part of the reasonably arguable position test as it applies a purely objective standard involving an analysis of the law and application of the law to the relevant facts.

40. In this sense the reasonably arguable position test imposes a higher standard than that required to demonstrate reasonable care. Because of these differences an entity may not have a reasonably arguable position in relation to a matter despite having satisfied the reasonable care test.

41. Although demonstrating a reasonably arguable position involves the application of a purely objective test, an entity will usually reach their position (at the time of making the statement) as a result of researching and considering the relevant authorities. In these circumstances, the efforts made by the entity to arrive at the correct taxation treatment will also demonstrate that reasonable care has been shown.

No presumption that there is a failure to take reasonable care where there is a false or misleading statement

42. There is no presumption that the existence of a shortfall amount caused by a false or misleading statement necessarily or automatically points to a failure to take reasonable care. The evidence must support the conclusion that the standard of care shown has fallen short of what would be reasonably expected in the circumstances. As noted by Hill and Hely JJ in *Hart v. Federal Commissioner of Taxation* (2003) 131 FCR 203; [2003] FCAFC 105; 2003 ATC 4665; (2003) 53 ATR 371 at paragraph 44:

> …in the ordinary case, the mere fact that a tax return includes a deduction which is not allowable is not of itself sufficient to expose the taxpayer to a penalty. Negligence, at least must be established...

43. This principle was emphasised in *Reeders v. Federal Commissioner of Taxation* [2001] AATA 933; 2001 ATC 2334; (2001) 48 ATR 1170 where it was decided that the entity and its tax agent had demonstrated reasonable care in relation to a claim made to deduct self education expenses. A penalty had been imposed under former section 226G of ITAA 1936 in respect of the agent's presumed lack of reasonable care because of the absence of evidence to show that reasonable care had been taken. The AAT found that the Commissioner's decision making process was flawed because it had failed to identify and consider the evidence that suggested a want of care. At paragraph 16 Tribunal member McCabe stated:

> Section 226G should not be approached on the basis that a penalty is imposed in the event of a shortfall, with the possibility of an exemption if the taxpayer is able to satisfy the decision maker that the taxpayer or his or her tax agent took reasonable care. A penalty under s226G is not triggered until the decision maker is satisfied that both limbs of the section are satisfied. Since the decision–maker in this case did not appear to consider whether the shortfall was attributable to a want of care on the part of the taxpayer or his … agent, the penalty should not have been imposed.

Importance of individual circumstances

44. Whether or not a shortfall amount results from a failure by an entity or their agent to take reasonable care depends on all of the relevant acts or omissions leading to the false or misleading statement. Liability to penalty will only arise where the particular conduct falls short of the standard of care expected of a reasonable person in the same circumstances. In other words, identifying what ought to have been done or ought not to have been done to avoid the risk of making a statement that is false or misleading underpins the imposition of penalty for failing to take reasonable care.

45. The appropriate standard of care required in making a statement is not immutable but takes account of the particular characteristics of the person concerned. Because there is no 'one size fits all' standard, the standard of care that is appropriate in a particular case necessarily takes account of:

- personal circumstances (such as age, health, and background);
- level of knowledge, education, experience and skill; and
- understanding of the tax laws.

46. Another consideration that influences the standard of care that is reasonable in the circumstances is the class of entity concerned. For example, as the Revised Explanatory Memorandum to the A New Tax System (Tax Administration) Bill (No. 2) 2000 notes, a salary and wage earner is likely to show reasonable care by diligently following the instructions in *TaxPack* as their obligations would be relatively straightforward. In contrast, an entity that conducts a business and has more onerous tax obligations arising from more complex transactions would be expected to implement appropriate record keeping systems and other procedures to ensure they comply with their tax obligations.

Personal circumstances

47. Personal circumstances have the potential to compromise a person's capacity to comply with their tax obligations. For example, age, mental health or physical incapacity may adversely affect the level of care and attention that can reasonably be expected in the circumstances.

Example 1 – circumstance of ill health – reasonable care taken

48. *Helen has been diagnosed with cancer and has had emergency surgery and intensive chemotherapy treatment. In preparing her tax return she overlooked a relatively small amount of interest earned on one of her investment accounts. While recovering from surgery and during her treatment she misplaced the relevant statement from the financial institution.*

49. *It is a reasonable conclusion that Helen's illness has contributed to her failure to correctly record interest earned during the income year. An appropriate conclusion is that a reasonable person in the same circumstances might not be as thorough or as organised in keeping records as a person who was not dealing with significant health issues. Taking her personal circumstances into account it is reasonable to conclude that Helen has exercised reasonable care.*

Example 2 – personal circumstances do not support reasonable care

50. *Richard is a professional musician. Because of his touring commitments he has spent roughly one week in every four away from home. When not on tour, he has had a full schedule of rehearsals and has also been making arrangements for his wedding. He has not had time to organise his tax records and has overlooked interest earned on one of his investment accounts. He explains that he forgot to include the interest because he had been too busy to devote time to organising his tax records and had misplaced the particular statement from the financial institution.*

51. *Although Richard has a busy professional and personal life, these are not special circumstances that warrant the application of a lower standard of care in meeting his tax obligations. These circumstances do not impair or compromise his capacity to comply with his taxation obligations. A reasonable person in Richard's circumstances would be expected to devote sufficient time to record keeping so assessable income is accurately returned.*

Knowledge, education, experience and skill

52. Other personal attributes such as knowledge, education, experience and skill may also have an impact on the level of care that is reasonable when making statements to the Commissioner. The standard of care required is commensurate with a reasonable person with the same background as the person making the statement.

Standard applicable to a person with expert tax knowledge

53. A professional person with specialist tax knowledge will be subject to a higher standard of care that reflects the level of knowledge and experience a reasonable person in their circumstances will possess.

54. The decision in *Arnett & Ors v. FC of T* 98 ATC 2137; (1998) 39 ATR 1095 illustrates this proposition. In that case, the entity's agent had requested an amended assessment on the basis that a lump sum payment on termination of employment was a bona fide redundancy payment and exempt from tax. The AAT found that the tax agent should have been expected to know or, at least find out, about possible treatment of the lump sum payment.

55. Similarly in *Case 1/2002* [2002] AATA 291; 2002 ATC 101; (2002) 49 ATR 1189 the AAT held that a taxpayer who was a senior officer in the Tax Office should, because of his position and experience, have been aware that a claim for a spouse rebate was unsound. The AAT found that his spouse had been conducting a business of buying and selling cars and the income from this activity disqualified the claim for the rebate. Senior Member Pascoe observed at paragraph 22 that 'in his position, he would have had a greater knowledge of the requirements of the Act and responsibilities of the taxpayer than an ordinary citizen' and that 'the volume and frequency of such transactions could lead to a view that the profits were assessable'.

56. In determining whether a person having special skill or competence has breached the standard of reasonable care, the appropriate benchmark is the level of care that would be expected of an ordinary and competent practitioner practising in that field and having the same level of expertise.

57. This means that factors such as the size, resourcing, degree of specialisation and the client base of the practitioner are relevant indicators of what represents a standard of reasonable care appropriate to the practitioner's professional peers. For example, what constitutes reasonable care in the case of a statement made by a suburban accountant in a small general practice is measured against the standard of care applicable to a reasonable and competent accountant in a practice that has these characteristics.

New entrants to tax system

58. The objective standard of reasonableness that applies is commensurately lower for a new entrant to the tax system who has little tax knowledge or experience in interacting with the tax system. This ensures that a person's behaviour is only penalised if it fails to measure up to the standard of a reasonable person with their same level of knowledge and experience.

Understanding of tax laws

59. In determining the standard of care that is reasonable and appropriate in the circumstances, factors such as the complexity of the law and whether the relevant law involves new measures are also relevant. These factors have the potential to affect an entity's capacity to understand their entitlements or obligations under the law.

60. If an entity is uncertain about the correct tax treatment of an item, reasonable care requires the entity to make appropriate enquiries to arrive at the correct taxation treatment. Such steps include contacting the Tax Office, referring to a Tax Office publication or other authoritative statement, or seeking advice from a tax agent. The type of enquiry or request for advice that is appropriate will depend on the circumstances. For example, in the context of determining the value of a taxable importation for GST purposes, it may be appropriate to obtain an expert valuation or seek advice from the Australian Customs Service in order to demonstrate reasonable care.

61. Where an entity makes a genuine effort commensurate with their ability to research and support the position taken, this will be an indicator in favour of the exercise of reasonable care. Even though an entity adopts a tax treatment that is inconsistent with the Commissioner's view, reasonable care will still be shown where a genuine effort is made to research the issue and there is a basis for the position taken.

62. In contrast, an interpretative position that is frivolous indicates a lack of reasonable care because it is likely to be consistent with making little or no effort to exercise sound judgment.

Example 3 – frivolous interpretative position – reasonable care not shown

63. *Felix, a business person who is already registered for GST, buys a residential property which he intends to put on the rental market. He has the premises painted before he makes them available for rent. He is uncertain about whether he can claim input tax credits for the painting and asks his nephew who is a second year law student for advice. Based on the advice he claims the input tax credits.*

64. *Felix has not acted reasonably in relying on the advice of an unqualified person. Had he checked with the Tax Office or consulted Tax Office publications he would have been informed that input tax credits are not able to be claimed for expenses in relation to the rental of residential premises.*

Using a tax agent

65. Using the services of a tax agent or tax adviser does not of itself mean that an entity discharges the obligation to take reasonable care. It remains the entity's responsibility to properly record matters relating to their tax affairs and to bring all of the relevant facts to the attention of the agent in order to show reasonable care. In *Re Sparks and Federal Commissioner of Taxation* [2000] AATA 28; (2000) 43 ATR 1324 the entity had failed to alert his accountant to the absence of a substantial amount of interest income. There was no acceptable explanation for the omission. The AAT found that the failure to disclose the interest income was not reasonable.

Applying for a private ruling

66. Although an entity may choose to obtain a private ruling from the Tax Office on a question of interpretation, failing to do so does not necessarily lead to a failure to take reasonable care. This proposition was confirmed by the Full Federal Court in *North Ryde RSL Community Club v. Federal Commissioner of Taxation* (2002) 121 FCR 1; [2002] FCAFC 74; [2002] FCA 313; 2002 ATC 4293; (2002) 49 ATR 579. The court held that the entity did not fail to take reasonable care by not seeking a private ruling about whether keno receipts were assessable income or subject to the mutuality principle.

67. In *MLC Limited v. Deputy Federal Commissioner of Taxation* (2002) 126 FCR 37; [2002] FCA 1491; 2002 ATC 5105; (2002) 51 ATR 283 Hill J also considered whether the failure to apply for a ruling amounted to a failure to take reasonable care. The substantive issue was whether in calculating the profit arising from the sale of property, subsection 82(2) of the ITAA 1936 applied to claw back deductions previously claimed under section 124ZH of Division 10D of the ITAA 1936. In finding that subsection 82(2) had no application, it followed that the penalty decision was also unsound. However, Hill J commented that even had he reached a different conclusion on the substantive issue there was still no failure to exercise reasonable care. This was demonstrated by the entity adopting an interpretative position based on expert tax advice that was also consistent with the commonly held industry view. Further, the entity had confirmed the position orally with the Tax Office. In rejecting the Commissioner's submission that failing to seek a private ruling was a failure to take reasonable care Hill J said at paragraph 53:

> …it is true that it could have sought a binding ruling from the Commissioner, but clearly failure to seek a ruling will not in every case be equated with failure to exercise reasonable care.

Appropriate record keeping systems and other procedures

68. A false statement arising from an oversight or an error in adding, subtracting or transposing amounts may result from a failure to take reasonable care, but such an error is not conclusive evidence of a lack of reasonable care.

69. Each situation will involve a unique mix of circumstances that informs an enquiry about whether reasonable care is shown or is lacking. As the Revised Explanatory Memorandum to the A New Tax System (Tax Administration) Bill (No. 2) 2000 notes at paragraph 1.72, for business entities reasonable care requires the putting into place of an appropriate record-keeping system and other procedures to ensure that the income and expenditure of the business is properly recorded and classified for tax purposes. The following practices are some examples of appropriate procedures:

- regular internal audits;
- sample checking;
- providing adequate staff training; and
- preparing instruction manuals for staff.

70. But what is appropriate and adequate for one business will not necessarily be sufficient for a different business. Factors such as the nature and size of the business will clearly be influential in determining what is sufficient in any given case.

Example 4 – small business – record keeping reasonable care shown

71. *Mabel and Fergus run a fish and chip shop. They are registered for GST and keep basic accounts for the business from which they prepare their quarterly activity statements. Mabel prepares the activity statement which is later checked by Fergus.*

72. *During a Tax Office audit a minor shortfall amount is identified for a tax period. The discrepancy is due to a transposition error.*

73. *Mabel and Fergus have exercised reasonable care because the record keeping system and procedures for checking the accuracy of their activity statements are appropriate and adequate given the size and nature of their business operations.*

74. The reasonable care standard does not require an entity to guard against every conceivable shortfall amount. If an entity's accounting systems and internal controls are appropriately designed and monitored to ensure that the likelihood of error is reduced to an acceptable level, this will be consistent with taking reasonable care.

75. However, whilst the possibility of human error cannot be eliminated, if a systemic error is detected and no steps are taken to rectify the problem, this will be a strong indicator that reasonable care has not been taken.

76. Conforming with general industry or business practice is likely to be consistent with taking reasonable care because it will indicate what other entities in the same circumstances considered appropriate to cover off a foreseeable risk. Likewise, failure to adopt accepted practice indicates a want of care because it suggests that the entity did not do what others in similar circumstances thought was proper and feasible.

Example 5 – large business – record keeping reasonable care not shown

77. *An employee of a large manufacturing company makes an error of $100,000 in transferring figures from the accounts to an activity statement. The chief accountant is aware that this employee has made similar transposition errors in preparing previous activity statements. Despite this knowledge, no steps were taken to put checks in place that would guard against the repetition of such a mistake.*

78. *The failure to implement appropriate procedures means that the entity has not exercised reasonable care.*

79. This example also highlights that entities are responsible for the acts of their employees provided the acts are within the acts authorised for that employee. Therefore, if an employee fails to meet the reasonable care standard, the employer is liable for the failure. This is so whether the entity is a natural person or not. The only difference is that a non-natural person must act through agents and employees as it is incapable of acting otherwise.

Relying on information provided by a third party

80. A statement may be false or misleading because it relies on incorrect information obtained from a third party. Whether this reliance indicates a failure by the statement maker to exercise reasonable care will depend on an examination of all the circumstances. Where, for example, an entity returns interest income based on incorrect information provided by the particular financial institution, there will not be a failure to take reasonable care unless the entity knew or could reasonably be expected to know that the statement was wrong.

Example 6 – relying on third party information – failure to take reasonable care

81. *Felicity owns a rental property that she lets permanently through a real estate agency. The agency provides monthly statements of rent and outgoings and deposits the net proceeds into Felicity's bank account. One statement has a typographical error which shows a net amount of $100 instead of the correct amount of $1,000. The correct amount has been deposited into the account.*

82. *Felicity did not check the statement and includes the incorrect monthly amount when she works out her rental income. A reasonable person would have had grounds to suspect that the amount recorded on the statement was wrong because it was significantly less than the other monthly statements. This could have been verified by cross checking the statement against the bank statement. A reasonable person in the same circumstances would have been more diligent than Felicity in ensuring that the correct amount of rental income was returned. Felicity has failed to exercise reasonable care.*

Example 7 – relying on third party information – reasonable care shown

83. *Giancarlo claims the maximum dependent spouse rebate on the basis that his wife has not derived any income for the year of income. He does not know that she has commenced paid part time work and that her income exceeds the threshold for the rebate entitlement. His wife has kept her job a secret and Giancarlo has no reason to suspect that she has her own income.*

84. *A reasonable person in Giancarlo's circumstances would not be expected to know or suspect that his rebate claim was based on a false assumption. He has exercised reasonable care in claiming the rebate.*

Tax agents relying on third party information

85. Whether a tax agent shows reasonable care by relying on information provided by a client that is incorrect also depends on an examination of all the circumstances. The reasonable care standard is not so demanding as to require a tax agent to extensively audit, examine or review books and records or other source documents to independently verify the entity's information. However, whilst it will not be possible or practical for an agent to scrutinise every item of information supplied, reasonable enquiries must be made if the information appears to be incorrect or incomplete.

86. Meeting this standard requires no more than acting in a way that does not breach the common law duty of care owed to the client. Conduct consistent with discharging that duty of care necessarily means that reasonable care is demonstrated.

87. In *Walker v. Hungerfords* (1987) 49 SASR 93; 88 ATC 4920; (1987) 19 ATR 745 (*Walker*) it was held that a firm of accountants was negligent in preparing income tax returns without checking the accuracy of depreciation calculations prepared by an unqualified bookkeeper employed by the client. The calculations were incorrect and resulted in an overstatement of the plaintiff's taxable income. The court distinguished the facts of the case from the situation where a competent expert prepares the information that is relied upon. Negligence was established because a reasonably careful accountant would have had grounds for questioning the correctness of the calculations to ensure that the information disclosed in the returns was accurate.

88. These principles are also relevant in determining whether reasonable care has been taken by a tax agent who makes a statement on behalf of a client. If the facts in *Walker* had instead produced an understatement of tax, there would have been a liability to penalty for failing to take reasonable care. This is because a reasonable accountant of ordinary professional competence would not have placed complete reliance on the accounts prepared by an unqualified bookkeeper.

89. On the other hand, a tax agent who relies on information prepared by an expert will have taken reasonable care unless they should reasonably have known that the information was incorrect. For example, a real property valuation prepared by a qualified valuer or an estimate of historical building cost made by a quantity surveyor are matters that are likely to be outside the range of professional expertise of a tax agent. Relying in good faith on advice of this nature is consistent with the taking of reasonable care even though the advice later proves to be deficient.

Likelihood that a statement is false or misleading

90. The likelihood of the risk that a statement is false or misleading is a relevant factor in deciding whether reasonable care has been exercised in making a statement to the Commissioner.

91. A failure to respond to every foreseeable risk will not necessarily mean that reasonable care is absent. In each case the seriousness of the risk must be weighed against the cost of guarding against it. For example, where there is a remote risk that the accounting systems leave open the possibility of a minor error, but the risk is not addressed because the cost would be prohibitive, reasonable care is still likely to be shown.

Relevance of the size of the shortfall amount

92. The size of a shortfall or the proportion of the shortfall to the overall tax payable, arising from making a false or misleading statement, are indicators pointing to the magnitude of the risk involved in making the statement. An entity dealing with a matter that involves a substantial amount of tax or involves a large proportion of the overall tax payable will be required to exercise a higher standard of care because the consequences of error or misjudgment are greater. However, all the individual circumstances leading up to the making of the false or misleading statement are to be weighed up in deciding whether reasonable care has been taken.

Example 8 – relatively large shortfall amount – reasonable care not shown

93. *During the income year Atticus had two separate periods of employment:*

- *first month with one employer; and*
- *the other 11 months with another employer.*

94. *When he prepares his tax return he shows the $40,000 income from the second job but forgets to include the $4,000 from the first job.*

95. *Given that the amount of the omission represents one eleventh of Atticus's total assessable income, it would be expected that a reasonable person would not have forgotten to return the income. The omission is also conspicuous because a reasonable salary and wage earner would have been prompted to query the missing month of employment. Atticus has not exercised reasonable care.*

Example 9 – relatively small shortfall amount – reasonable care shown

96. *A large company returns assessable income of $4 million but because of an isolated transposition error it omits an additional $40,000. The omission was caused by inadvertent human error and not by a failure in the reporting systems or procedures.*

97. *In contrast to example 8, the amount of the omission represents a very small proportion of the total assessable income.*

98. *In these circumstances and given the relative size of the omission, the company has acted with reasonable care despite the error.*

Meaning of recklessness as to the operation of a taxation law

99. The legislative context apparent from a reading of items 1, 2 and 3 of the table in subsection 284-90(1) indicates that 'recklessness' connotes conduct that is more culpable than a failure to take reasonable care to comply with a taxation law but less culpable than an intentional disregard of a taxation law. The scheme of the uniform penalties regime is to impose the higher penalty of 50% of the shortfall amount in response to conduct that goes beyond mere carelessness or inadvertence by displaying a high degree of carelessness.

100. Like the test for determining whether reasonable care has been shown, a finding of recklessness depends on the application of an essentially objective test. There must be the presence of conduct that falls short of the standard of a reasonable person in the position of the entity. Similar to the position with a failure to take reasonable care, dishonesty is not an element of establishing recklessness. The actual intention of the entity is of no relevance.

101. Behaviour will indicate recklessness where it falls significantly short of the standard of care expected of a reasonable person in the same circumstances as the entity. Although the test for determining whether recklessness is shown is the same as that applied for testing a want of reasonable care, it is the extent or degree to which the conduct of the entity falls below that required of a reasonable person that underscores a finding of recklessness.

102. Recklessness assumes that the behaviour in question shows disregard of or indifference to a risk that is foreseeable by a reasonable person. The Full Federal Court in *Hart v. FC of T* (2003) 131 FCR 2003; [2003] FCAFC 105 (*Hart*) at paragraphs 33 and 43 endorsed[8] the following comments of Cooper J in *BRK (Bris) Pty Ltd v. Federal Commissioner of Taxation* [2001] FCA 164; 2001 ATC 4111; (2001) 46 ATR 347 (*BRK*) at paragraph 77:

> Recklessness in this context means to include in a tax statement material upon which the Act or regulations are to operate, knowing that there is a real, as opposed to a fanciful risk that the material may be incorrect, and a reasonable person in the position of the statement-maker would see there was a real risk that the Act and regulations may not operate correctly to lead to the assessment of the proper tax payable because of the content of the tax statement. So understood the proscribed conduct is more than mere negligence and must amount to gross carelessness.

[8] Hill and Hely JJ; Spender J dissented on the issue of the penalty.

103. This was the same approach to interpreting the notion of recklessness as was taken in *Shawinigan Ltd v. Vokins & Co Ltd* [1961] 2 Lloyd's Rep 153 at 162; [1961] 1 WLR 1206 at 1214; [1961] 3 All ER 396 at 403 where Megaw J said:

> Recklessness is gross carelessness – the doing of something which in fact involves a risk, whether the doer realises it or not; and the risk being such having regard to all the circumstances, that the taking of that risk would be described as 'reckless'. The likelihood or otherwise that damage will follow is one element to be considered, not whether the doer of the act actually realised the likelihood. The extent of the damage which is likely to follow is another element…

104. Megaw J noted further that the degree of the risk and the gravity of the consequences need to be weighed in forming a conclusion about whether conduct is reckless. He observed at 403:

> If the risk is slight and the damage which will follow if things go wrong is small, it may not be reckless, however unjustified the doing of the act may be. If the risk is great, and the probable damage great, recklessness may readily be a fair description, however much the doer may regard the action as justified and reasonable. Each case has to be viewed on its own particular facts and not by reference to any formula.

Guidance from the case law

105. The substantive issue in *Hart* was whether deductions for aircraft expenses were properly disallowed on the basis that the activities did not constitute the carrying on of a business. Penalty had been imposed by the Commissioner under former section 226H of the ITAA 1936 on the basis of a finding of recklessness. The relevant facts included:

- the tax return had been prepared by the accounting firm of the applicant's husband with full knowledge of the relevant circumstances surrounding the claim;
- evidence of a long history of very low income for very high outgoings; and
- the significant amount of the deduction in dispute – in the sum of $58,000.

106. In dismissing the appeal, Dowsett J in *Hart v. Federal Commissioner of Taxation* [2002] FCA 1559; 2002 ATC 5193; (2002) 51 ATR 471 concluded at paragraph 26 that in the circumstances 'any reasonably well-informed tax agent' would have addressed the possibility that no business was being carried on and that any 'rational consideration of the facts' would have demonstrated that no business was being carried on in connection with the activities.

107. On appeal to the Full Federal Court, Hill and Hely JJ agreed that the claim to the tax deduction was so tenuous that it was only explicable on the basis of gross negligence in propounding the claim. No subjective enquiry as to whether the agent had actual knowledge that the statement was false was needed: the facts objectively analysed spoke for themselves. A reasonable tax agent would have foreseen the significant risk that the claim for the deduction was highly likely to involve an incorrect application of the law. In the circumstances, disregarding this risk equalled recklessness.

108. The facts in *BRK* also illustrate that the standard of care expected of a tax agent will be measured against that of a reasonable tax agent in the same circumstances. That case essentially concerned a false claim that certain beneficiaries had a present entitlement to trust income. The correct position was that the trustee was assessable on the income on the basis that there was no beneficiary presently entitled. In making the statement, the tax agent took the risk that the trust deed permitted the appointment of the beneficiaries. The evidence showed that the tax agent had legal advice that the particular terms of the trust deed needed to authorise the appointment. Cooper J inferred from the evidence that there was no attempt by the agent to ascertain whether there had been a valid appointment under the trust. If there had been such an investigation, the agent would have discovered that the purported beneficiary had no present entitlement to the income. Cooper J concluded at paragraph 80 that when the income tax returns were prepared, the agents:

> …were indifferent as to whether or not the statements as to the distribution of income contained in the returns were correct. It was reasonably foreseeable to a person in their position that to allow the preparation and lodgement of the tax returns on that basis would cause the Act to operate so as to bring the income of the Trust to account under s97 of the Act rather than s 99A(4), when there was a real risk that that was not the correct basis on which the income ought to be assessed.

Meaning of intentional disregard of a taxation law

109. Under item 1 of the table in subsection 284-90(1), a base penalty amount of 75% of the shortfall amount applies if the shortfall results from intentional disregard of a taxation law. In the graduated scheme of penalties, the penalty for intentional disregard is the most severe sanction in response to a serious failure to comply with tax obligations.

110. The adjective 'intentional' means that something more than reckless disregard of or indifference to a taxation law is required.

111. Unlike the objective test which applies to determine whether there has been a want of reasonable care or recklessness, the test for intentional disregard is purely subjective in nature. The actual intention of the entity is a critical element.

112. Intentional disregard means that there must be actual knowledge that the statement made is false. To establish intentional disregard, the entity must understand the effect of the relevant legislation and how it operates in respect of the entity's affairs and make a deliberate choice to ignore the law.[9]

113. Dishonesty is a requisite feature of behaviour that shows an intentional disregard for the operation of the law. This is another significant difference between this type of behaviour and behaviour that shows a want of reasonable care or recklessness where dishonesty is not an element.

114. Evidence of intention must be found through direct evidence or by inference from all the surrounding circumstances, including the conduct of the entity.

115. A mere failure to follow the Commissioner's view contained in a private ruling is not evidence of intentional disregard. However, if an entity ignores an unfavourable private ruling on a matter where the law is clearly established, that may constitute intentional disregard.

116. *Weyers v. Federal Commissioner of Taxation* [2006] FCA 818; 2006 ATC 4523; (2006) 63 ATR 268 illustrates the proposition that intentional disregard of the law can be inferred from the facts and surrounding circumstances. In that case a tax agent prepared tax returns for his clients that failed to return trust distributions as income on the basis that the amounts were not trust distributions but payments by way of loan. Dowsett J concluded at paragraph 168 that on the evidence the tax agent must have known that the amounts were trust income derived and not payments by way of loan. The evidence included the fact that the tax agent had told his clients the money drawn from the trust was their money which implied that it was available for them to use in their absolute discretion. Further, the court was able to conclude that the tax agent knew the amounts paid by the trustee of the trust were not loans because he knew they did not have to be repaid and that no interest was payable. Although there was no direct evidence of the taxpayer's knowledge, the surrounding facts supported the inference that the tax agent must have intentionally disregarded the requirement to disclose the income.

[9] Refer to judgment of Collier J in *Price Street Professional Centre Pty Ltd v. Federal Commissioner of Taxation* [2007] FCA 345; 2007 ATC 4320; (2007) 66 ATR 1 at paragraph 43.

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Subject references:

- administrative penalty
- intentional disregard
- reasonable care
- recklessness
- tax administration

Legislative references:

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- ITAA 1936 124ZH
- ITAA 1936 Pt VII
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