

MT 2008/1A1 - Addendum - Penalty relating to statements: meaning of reasonable care, recklessness and intentional disregard

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Addendum

Miscellaneous Taxation Ruling

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

This Addendum amends Miscellaneous Taxation Ruling MT 2008/1 to reflect the amendments made to Division 284 of Schedule 1 to the *Taxation Administration Act 1953* which extends the existing administrative penalty regime to cover false or misleading statements made to the Commissioner that do not produce a shortfall amount and false or misleading statements made to other entities where the statement is for the purposes of taxation law or permitted or purported to be permitted for the purposes of taxation law. The Addendum also reflects amendments regarding the 'safe harbour' provisions that apply to entities in certain circumstances.

Miscellaneous Taxation Ruling 2008/1 is amended as follows:

1. Paragraph 1

Omit the paragraph; substitute:

1. This Ruling gives the Commissioner's interpretation of the concepts 'reasonable care', 'recklessness' and 'intentional disregard' as used in Subdivision 284-B and 'intentional disregard' and 'recklessness' as used in subsection 286-75(1A)^{1A} 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.

^{1A} Subsection 286-75(1A) was inserted by the *Tax Agent Services (Transitional Provisions and Consequential Amendments) Act 2009* and applies to the failure to lodge a return, notice, statement or document required to be given to the Commissioner on or after 1 March 2010.

2. Paragraph 11

Omit the first dot point; substitute:

- makes a statement that is false or misleading in a material particular to:
 - the Commissioner or to an entity that is exercising powers or performing functions under a taxation law – subsection 284-75(1); or
 - to an entity other than the Commissioner and an entity that is exercising powers or performing functions under a taxation law and the statement is one required or permitted to be made by a taxation law – subsection 284-75(4).

3. Paragraphs 12 to 14

Omit the paragraphs; substitute:

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.

12A. Subsection 284-75(4) imposes a penalty where you make a statement to an entity other than the Commissioner and an entity that is exercising powers or performing functions under a taxation law and:

- the statement is, or purports to be, one required or permitted by a taxation law; and
- the statement is false or misleading in a material particular whether because of things in it or omitted from it.^{2A}

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.

^{2A} The Explanatory Memorandum that introduced this provision provides the following examples of the types of statements that are covered by the provision: '...they would include the statements the tax law requires the trustee of a super fund to provide to the fund's members and they would also include declarations that employees may opt to give to their employers to reduce the amount of tax withheld from their wages'. See paragraph 6.14 to the *Tax Laws Amendment (2010 Measures No 1) Bill 2010*.

12B. Under subsection 284-75(6) you are not liable to an administrative penalty under subsection 284-75(1) or 284-75(4) if:

- (a) you engage a registered tax agent or BAS agent; and
- (b) you give the registered tax agent or BAS agent all relevant taxation information; and
- (c) the registered tax agent or BAS agent makes the statement; and
- (d) the false or misleading nature of the statement did not result from:
 - (i) intentional disregard by the registered tax agent or BAS agent of a taxation law; or
 - (ii) recklessness by the agent as to the operation of a taxation law.^{2B}

13. The exception in 284-75(5) means that there is no liability to an administrative penalty under 284-75(1) or 284-75(4) if you, and your agent (if relevant), took reasonable care in connection with the making of the statement.^{2C}

14. An entity's agent, in the context of subsection 284-75(1) and (4), means someone who is authorised to represent the entity in making a statement to the Commissioner and is not restricted to a registered tax agent. However, in order for the safe harbour provision in subsection 284-75(6) to apply, the agent must be a registered tax agent or BAS agent.

4. Paragraph 19

19. If an entity is liable to an administrative penalty under subsection 284-75(1) or subsection 284-75(4), 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);

^{2B} Subsection 284-75 (6) was inserted by *Tax Laws Amendment (2010 Measures No. 1) Act 2010* with effect from 4 June 2010. Subsection 284-75(1A) was inserted by the *Tax Agent Services (Transitional Provisions and Consequential Amendments) Act 2009* and applied to statements given on or after 1 March 2010. Subsection 284-75(1A) was repealed when subsection 284-75(6) took effect.

^{2C} For guidance on the periods before 4 June 2010, see Miscellaneous Tax Ruling MT 2008/1 issued 12 November 2008.

- increase (section 284-220) or decrease (section 284-225) the base penalty amount if certain conditions are satisfied; and
- consider remission.

5. Paragraph 20

Omit 'leading to the shortfall amount'.

6. Paragraph 21

Omit the paragraph; substitute:

21. Where a 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 a 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 a 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.

21A. Where a statement is false or misleading in a material particular but does not result in a shortfall amount, the base penalty amount still reflects the level of care taken by the entity. Where the statement is false and misleading and is due to:

- failure to take reasonable care, the base penalty amount is 20 penalty units; or
- recklessness, the base penalty amount is 40 penalty units; or
- intentional disregard, the base penalty amount is 60 penalty units.

21B. If the base penalty amount arose from the application of a taxation law in accordance with:

- advice given to you or your agent by or on behalf of the Commissioner; or
- general administrative practice under that law; or
- a statement in a publication approved in writing by the Commissioner

then, section 284-224 can reduce the base penalty amount.

21C. Subsection 286-75(1) imposes an administrative penalty for not giving to the Commissioner a return, notice, statement or document required under a taxation law by a given date.

21D. However, under subsection 286-75(1A) you are not liable to a penalty for failing to lodge a document by the due date if:

- (a) you engage a registered tax agent or BAS agent; and
- (b) you give the registered tax agent or BAS agent all relevant taxation information to enable the agent to give a return, notice, statement or other document to the Commissioner in the approved form by a particular day; and
- (c) the registered tax agent or BAS agent does not give the return, notice, statement or other document to the Commissioner in the approved form by that day; and
- (d) the failure to give the return, notice, statement or other document to the Commissioner did not result from:
 - (i) intentional disregard by the registered tax agent or BAS agent of a taxation law; or
 - (ii) recklessness by the agent as to the operation of a taxation law.

7. Paragraphs 27, 34, 52 and 90

After 'Commissioner'; insert 'or to an entity within the meaning of subsection 284-75(4)'.

8. Paragraph 42

After the first sentence insert:

Similarly, in cases where there is no shortfall, there is no presumption that the making of the false or misleading statement automatically points to a failure to take reasonable care.

9. Paragraph 44

Omit 'Whether or not a shortfall amount results from a'; substitute 'A'.

10. Paragraph 65

After the paragraph; insert:

65A. An entity that engages a registered tax agent or BAS agent will not be liable for an administrative penalty under in the circumstances outlined in paragraph 12B or 21D of this Ruling.

11. Paragraph 88

After the second sentence; insert footnote 7A:

^{7A} For statements made on or after March 2010, an entity may not be liable to a penalty if the understatement of tax resulted from the failure of a registered tax agent or BAS agent to take reasonable care in making the statement – see paragraph 12B of this Ruling.

12. Paragraph 92

Omit the paragraph and heading; substitute:

Relevance of the size of a shortfall amount

92. The size of a shortfall or the proportion of a 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.

13. Paragraph 99

- (a) Omit 'and 3'; substitute ', 3, 3A, 3B and 3C'.
- (b) Omit 'of 50% of the shortfall amount'.

14. Paragraph 109

Omit the paragraph; substitute

109. Under item 1 of the table in subsection 284-90(1), a base penalty amount of 75% of a shortfall amount applies if the shortfall results from intentional disregard of a taxation law. Similarly, under Item 3A of the table in subsection 284-90(1), a base penalty amount of 60 penalty units applies if a statement is false or misleading because of intentional disregard of a taxation law that does not result in a shortfall amount. 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.

15. Legislative references

Insert:

- TAA 1953 Sch 1 284-75(1A)
- TAA 1953 Sch 1 284-75(4)
- TAA 1953 Sch 1 284-75(5)
- TAA 1953 Sch 1 284-75(6)
- TAA 1953 Sch 1 284-224
- TAA 1953 Sch 1 286-75(1A)

This Addendum applies on and from 4 June 2010.

Commissioner of Taxation

1 June 2011

ATO references

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