


***ST 2254 - SALES TAX : REMISSION UNDER
SUB-SECTION 47(3) OF ADDITIONAL TAX IMPOSED
BY SUB-SECTION 45(2) OF THE SALES TAX
ASSESSMENT ACT (No. 1)***

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TAXATION RULING NO. ST 2254

SALES TAX : REMISSION UNDER SUB-SECTION 47(3) OF
ADDITIONAL TAX IMPOSED BY SUB-SECTION 45(2) OF THE
SALES TAX ASSESSMENT ACT (No. 1)

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REFERENCE NO:	SUBJECT REFS:	LEGISLAT. REFS:
I 1206299	REMISSION OF ADDITIONAL (PENALTY) TAX	SALES TAX ASSESSMENT ACT (No. 1) SECTIONS 45 AND 47

OTHER RULINGS ON TOPIC : IT 2141, ST 2130

PREAMBLE This ruling provides guidelines for the exercise of the Commissioner's discretion under sub-section 47(3) to remit the statutory penalty imposed by sub-section 45(2) of the Sales Tax Assessment Act (No. 1) and the corresponding provisions in the Sales Tax Assessment Acts (Nos 2 - 11). These guidelines replace those included in the Head Office memorandum of 4 July 1969 relating to the remission of additional tax imposed by the former paragraph 46(1)(b) of the Sales Tax Assessment Act (No. 1) and the former paragraphs 8(1)(b) and (c) of the Sales Tax Procedure Act.

Imposition of Penalty

2. The guidelines take into account changes to the law following the enactment of the Taxation Laws Amendment Act 1984. The new sub-section 45(2) introduced by the abovementioned Act imposes additional tax by way of penalty where a taxpayer -

- (a) makes a statement for a purpose in connection with the operation of the Act or regulations (whether to a taxation officer or another person) that is false or misleading in a material particular; or
- (b) omits something from a statement that renders it misleading in a material particular,

and, in the result, there is an evasion of tax.

3. In either case, the taxpayer is liable to additional tax equal to double the amount by which the sales tax properly payable by the taxpayer exceeds the sales tax that would be payable if the statement were correct.

False or Misleading Statement Concept

4. Taxation Ruling No. IT 2141 provides guidelines for use

in applying the false or misleading statement concept incorporated in the various taxation laws by amendments effected to those laws by the Taxation Laws Amendment Act 1984. Those laws include :

- . Sales Tax Assessment Act (No. 1) 1930 - section 45;
- . Sales Tax Assessment Acts (Nos. 2 to 10) - section 12 of each Act (which applies section 45 of the Sales Tax Assessment Act (No. 1) 1930);
- . Sales Tax Assessment Act (No.11) - section 16 of this Act (which applies section 45 of Sales Tax Assessment Act (No.1) 1930);
- . Sales Tax (Exemptions and Classifications) Act 1935 and Sales Tax Procedure Act 1934 - section 45 of the Sales Tax Assessment Act (No. 1) 1930; and
- . Taxation Administration Act 1953 - sections 8K, 8N and 8P.

5. As indicated in paragraph 5 of Taxation Ruling No. IT 2141, the principles embodied in that ruling are to be applied in determining under sub-section 45(2) whether or not a false or misleading statement has been made.

6. Taxation Ruling No. ST 2130 sets out some examples of false or misleading statements in typical sales tax situations - the examples are not intended to be exhaustive - and provides some additional guidelines on the application of the principles contained in Taxation Ruling No. IT 2141 in situations that have particular relevance to sales tax.

Section 45

7. Although covered more fully in IT 2141, the following points should also be noted in relation to the new statutory provisions and, in particular, section 45 -

- . The new provisions apply to statements made on or after 14 December 1984 including statements made on or after that date in relation to earlier returns.
- . As with the provision it replaces, it is section 45 which imposes the penalty. The section automatically comes into effect where the conditions for its operation exist.
- . The statutory penalty imposed under section 45 is double the amount of the sales tax sought to be evaded.
- . In the new sub-section 45(2) deceit is not an element; as indicated in IT 2141, the provision is attracted when a statement is misleading notwithstanding that it is honestly made. However, matters such as intent, knowledge, honesty, etc., are taken into account in considering any remission of penalties.

8. The remission guidelines contained in this ruling, which should be read in conjunction with IT 2141 and ST 2130, do not address the question of whether section 45 is applicable to a particular situation - that is, whether additional tax is imposed by the section. They are concerned only with the remission of the section 45 additional tax. They also apply to the remission of penalty imposed by the former sub-paragraphs 46(1)(b) of the Sales Tax Assessment Act (No. 1) or 8(1)(b) or 8(1)(c) of the Sales Tax Procedure Act which apply to offences which occurred prior to 14 December 1984.

Discretion to Deputy Commissioners

9. In providing these guidelines, there is no intention of laying down any conditions to restrict Deputy Commissioners and authorising officers in the exercise of the discretion to remit additional tax. It is essential that Deputy Commissioners and authorising 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.

10. It is emphasised that the 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. The guidelines are intended to assist officers in the exercise of the discretion and to help ensure that taxpayers do not receive inconsistent treatment from different Branch Offices. At all times, these remission guidelines should be administered in a common sense manner. Within the broad framework of the guidelines each case has to be determined on its own facts, i.e., the factors relevant to the remission of penalty have to be weighed up.

Administrative Procedures

11. 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 any aggravating or mitigating factors to be taken into account in determining the extent of any remission to be made. In deciding the extent to which the statutory additional tax is remitted, officers exercising the discretion should clearly state the reasons for their decision. In the event that the extent of the remission in any case is challenged in any way the reasons for the decision will be apparent.

12. In cases where the extent of the remission is challenged, the person reviewing the extent of the remission will be required to carefully consider whether there is any case for varying the level of penalty. In doing so that person should also take account of these guidelines.

RULING Remission of the Additional Tax under Sub-section 47(3)

13. Sub-section 47(3) gives the Commissioner power to remit the whole or any part of the additional tax imposed by section

45. It recognises that, in the context of section 45, there are degrees of culpability. Some situations require substantial penalty, others less substantial. Consequently, what an authorising officer is doing under sub-section 47(3) in determining a rate is remitting some or all of the penalty that has already been imposed by statute. The extent of any remission of the additional tax will depend upon the sufficiency of reasons, i.e., mitigating circumstances, in each case.

Guidelines for Remission of the Sub-section 45(2) Additional Tax

14. The general remission guidelines set out in these paragraphs should be applied to all matters penalisable under sub-section 45(2) except, of course, matters in respect of which prosecution action has been instituted against the taxpayer and not withdrawn (see section 8ZE of the Taxation Administration Act 1953).

15. Situations calling for the exercise of the power of remission in sub-section 47(3) fall into two categories, i.e., voluntary admissions of a false or misleading statement and non-voluntary cases.

Voluntary Admission of False or Misleading Statements

16. The additional tax imposed by section 45 may be remitted to an extent necessary to reduce the additional tax to an amount equal to 10% per annum of the sales tax sought to be evaded subject to a maximum of 50% of the sales tax sought to be evaded.

17. To qualify for this concessional treatment the voluntary admission must :

- (a) be a full and true disclosure of all material facts relating to the tax evaded; and
- (b) not be due, directly or indirectly, to departmental activities in connection with the affairs of the taxpayer concerned.

18. Under (a) a disclosure must be reasonably complete in order to warrant the concessional treatment. Where the degree of incompleteness is small, the whole of the evaded tax may be treated as covered by the voluntary disclosure. On the other hand, where, for example, a taxpayer voluntarily discloses an omission of sales and a subsequent investigation reveals further substantial omissions the concessional treatment should be denied if the taxpayer could reasonably be expected to have been aware of those further omissions.

19. In relation to (b), disclosures are sometimes claimed to be voluntary when, in fact, they are prompted by departmental action which has already been initiated and which may have indicated to the taxpayer that his affairs were being investigated. Such action may comprise indirect enquiries (e.g., at the taxpayer's bank), direct enquiries of the taxpayer, such as an initial interview prior to the investigation, or an investigation of the taxpayer's liability to other taxes. For instance, omitted sales may be disclosed by a taxpayer consequent upon an investigation of the taxpayer's income tax affairs, or an inspection in connection with tax

instalments deducted from salary or wages of employees under the PAYE system. Such disclosures should not be treated as voluntary. The mere listing of a taxpayer's name for future investigation does not, however, preclude the possibility of a voluntary disclosure on his part.

20. Similarly, a disclosure made by a taxpayer consequent upon departmental action concerned with a partnership, trust or private company with which he is connected is not regarded as voluntary in the sense of warranting the concessional treatment. On the other hand, a disclosure by a taxpayer following the investigation of one of his relatives or other taxpayers in his district may be accepted as a voluntary disclosure so long as no departmental action concerning the taxpayer himself or an associated partnership, trust or private company has been initiated.

Non - Voluntary Detection of False or Misleading Statements

21. In these cases, in the absence of aggravating or mitigating factors (see later), the discretion under sub-section 47(3) should be exercised to reduce the additional tax imposed by section 45 to an amount equal to -

- . 20% per annum of the tax sought to be evaded (the per annum component) - 10% per annum for the period up to and including 19 December 1984 - plus
- . 40% of the tax sought to be evaded (the culpability component).

22. Depending on the degree of seriousness of the offence, the culpability component may be increased by a further 10% - 50% of the tax evaded for each of the following circumstances -

- (a) Deliberate steps have been taken, either before or after the commencement of official enquiries, to conceal the evasion of tax.
- (b) The above steps have involved corruption of employees or collusion.
- (c) There has been previous tax evasion by or on behalf of the taxpayers.
- (d) There has been a lack of co-operation such as to cause undue or excessive enquiries, or there has been obstruction or hindrance.
- (e) There are other factors not covered by (a) to (d) which might add to the taxpayers degree of culpability, e.g., the taxpayer has advised or encouraged others in the practice of tax evasion and fraud.

23. The following are some examples of aggravating factors. The seriousness of any of these factors will depend on the facts of each case.

- (i) Invoices or other records have been falsified or altered, or omitted sales have been

concealed by means of a second set of records. Relatively small understatements associated with, say, the falsification of a few invoices would be regarded as less reprehensible than say the maintenance for evasion purposes of a second set of books.

(ii) The taxpayer has directed an employee to alter documents or, in collusion with another person, goods have been misdescribed on invoices to indicate a classification at a lower rate than actually applies.

(iii) The taxpayer has been previously involved in tax evasion. The additional rate of penalty will depend on the extent of the evasion, whether or not the evasion was deliberate and the nature and number of previous offences.

(iv) A taxpayer who has not brought to account in a return goods applied to own use and who initially fails to respond to enquiries but subsequently complies with a formal notice issued under section 23 of the Sales Tax Assessment Act (No. 1) is likely to fall within the lower end of the penalty scale (e.g., an additional 10% culpability). However, additional penalty of a significantly greater amount would apply where the taxpayer's behaviour bordered on obstruction and enquiries are excessively delayed as a result.

24. Of course, the penalty imposed under section 45 cannot exceed the statutory maximum, i.e., 200% of the tax sought to be evaded.

Circumstances Warranting Further Remission of Penalty

25. The additional tax calculated by reference to paragraphs 21 to 24 may be further reduced where mitigating factors exist. While it is not possible to specify all those situations where it is considered that further remission is warranted, there will be situations where the false or misleading statement could be considered either wholly or substantially excusable.

26. In giving the following examples of circumstances that might warrant further remission of penalty it is emphasised that the list is not intended to be exhaustive; it is merely illustrative of the kind of circumstances warranting further reduction of the penalty. In the final analysis, the responsibility rests with authorising officers to apply the law to the facts and circumstances of each case, in the light of these guidelines, with commonsense and in a reasoned and consistent manner.

27. Subject to these comments, circumstances of the kind warranting further remission would include cases such as the following -

(a) The taxpayer did not know and could not reasonably

be expected to have known that the statement was false or misleading.

- (b) The taxpayer's statement even though false or misleading, was occasioned by an innocent error, inadvertence or honest mistake, where no carelessness was present. For example, the taxpayer's statement occurred as a result of minor and infrequent clerical errors which could reasonably be expected to occur having regard to the volume of transactions conducted by the taxpayer or the range of goods marketed.
- (c) The taxpayer has genuinely misunderstood the requirements or the application of the law. For example :
 - (i) the taxpayer has been misled by his or her reading of the return form or related instructions;
 - (ii) the taxpayer has made a genuine mistake in interpreting a complex provision of the law.
- (d) The taxpayer has been misled by actions of this office.
- (e) The taxpayer's statement was occasioned by ignorance of the law in the sense that, in the particular circumstances, he or she could not reasonably be expected to have been aware of the requirements in question, e.g., where the requirements related to an insignificant part of the taxpayer's business.
- (f) The taxpayer's statement was occasioned by carelessness (i.e., not recklessness) of a minor nature and there are other mitigating factors, e.g., advanced age or serious illness, which explain or excuse that carelessness to a substantial extent.
- (g) Where the office adjustment is clearly contentious. This does not mean that there should be a further remission of penalty merely because the precise quantum of the adjustment cannot be proved. A lower penalty should be considered only where the quantum or legality of the adjustment is open to genuine dispute. The nature and extent of disclosures originally made in the return would be relevant factors. The fuller the disclosure the greater the case will be for further remitting penalty in these circumstances.
- (h) The effect of the penalty, having regard to the taxpayer's net assets and potential earning capacity, would be such as to amount to a 'ruinous imposition', i.e., leave the taxpayer with little or no remaining assets.

28. In deciding the extent of remission in circumstances such as those indicated in the previous paragraph, it would be appropriate to have regard to mitigating factors such as -

- (i) the taxpayer has not previously been subjected to additional tax under section 45 and the tax sought to be evaded is relatively minor;
- (ii) the age of the taxpayer;
- (iii) whether, at the time of making the statement, the taxpayer or some immediate family member was suffering from serious illness; and
- (iv) any language or comprehension problems that the taxpayer may have.

29. Where the taxpayer's offence is considered substantially but not wholly excusable, a reduction in the culpability component of the penalty depending on the extenuating factors would be appropriate. Where the circumstances are such that the taxpayer's offence is considered to be wholly excusable, the whole of the culpability component of the penalty may be remitted. However, it is not envisaged that this would be the case in the vast majority of cases. In determining the appropriate level of penalty in a particular case, it may also be relevant if the taxpayer, after making a false or misleading statement, has had later opportunities to correct the error but has not done so.

30. The per annum component of the basic penalty is intended to reflect the length of time a taxpayer has had the use of monies properly payable to the revenue. It follows that reduction of the per annum component will seldom be warranted in situations where a taxpayer retains the benefit of the evasion of sales tax, e.g. -

- (a) where goods are sold for a price which reflects the sales tax payable but this circumstance is not disclosed in the taxpayer's return; or
- (b) where goods are applied for the taxpayer's own use or are transferred to his or her retail stock and the taxpayer fails to disclose the arrangements.

31. A taxpayer who had passed the benefit of the evasion of the sales tax to an arm's length purchaser, e.g., where goods are sold net of sales tax or at a lower rate of tax, would not have had the use of the funds over the relevant period. Moreover, such a taxpayer would be liable to pay the evaded sales tax notwithstanding that the purchaser obtained the benefit. In view of these considerations, some or all of the per annum component could be remitted in cases where the evasion was occasioned by innocent error. On the other hand, as the revenue would have been deprived of the sales tax for the relevant period no further remission is warranted where the taxpayer sold the goods to an associate, or where the evasion was a deliberate attempt by the taxpayer to obtain an advantage over competitors.

Calculation of Per Annum Component

32. The calculation of the per annum component is based on the period from the date that the sales tax was originally due for payment (i.e. 21 days after the close of the month in which the goods were sold, treated as stock for sale by retail, or applied by the taxpayer for his own use) to the date when the taxpayer voluntarily lodges a supplementary return or an assessment is made.

33. The fact that a taxpayer has paid all or some of the tax sought to be evaded prior to the date determined above should be taken into account in the calculation of the per annum component.

34. There should be a separate calculation where sales tax has been evaded in more than one month. That is, the per annum component is calculated in respect of each month's sales tax liability.

35. Where it is not possible to determine the precise dates of sales, and sales tax has been evaded over a number of months, the sales tax evasion should be apportioned over the relevant period. For example, if say \$6,000 in sales tax has been evaded over a 6 month period it should be assumed, subject to any evidence to the contrary, that \$1,000 was evaded each month, and the appropriate due dates should be deemed to apply.

Sales Disclosed in Another Return

36. Although departure from the guidelines is not considered to be warranted in cases where sales omitted from a taxpayer's return have been returned by another taxpayer, calculation of the penalty should be based on the actual tax which has been evaded in overall terms due to the sales having been returned elsewhere. Where such sales are disclosed by the taxpayer in a subsequent return and tax has therefore been deferred, it would be appropriate to include a per annum component for the period of deferment.

37. Deputy Commissioners should refer to Head Office any problems of a general nature that might arise in the application of this ruling.

COMMISSIONER OF TAXATION

16 JUNE 1986