



LCG 2015/D10 - Attribution Managed Investment Trusts: administrative penalties for recklessness or intentional disregard of the tax law - section 288-115

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 This document has changed over time. This is a consolidated version of the ruling which was published on *3 December 2015*



Attribution Managed Investment Trusts: administrative penalties for recklessness or intentional disregard of the tax law – section 288-115

Relying on this draft Guideline

This draft Law Companion Guideline describes how the Commissioner proposes to apply the law in [Tax Laws Amendment \(New Tax System for Managed Investment Trusts\) Bill 2015](#) when it comes into effect. If you rely on this draft Guideline in good faith before it is finalised, and the law is enacted as introduced, you will not have to pay any underpaid tax, penalties or interest in respect of matters it covers if it does not correctly state how a relevant provision applies to you.

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What this draft Guideline is about

1. Under the new regime for attribution MITs (AMITs¹), broadly, mistakes made in calculating ‘determined trust components’ in one year, may be fixed in the year they are discovered without the need to amend prior year returns. Such discovered mistakes are referred to as ‘unders’ and ‘overs’.

¹ An AMIT is a managed investment trust that has elected in to the attribution regime for the taxation of MITs contained in Division 276 of the *Income Tax Assessment Act 1997*, as proposed to be amended by Tax Laws Amendment (New Tax System for Managed Investment Trusts) Bill 2015.

2. The trustee of an AMIT is liable to an administrative penalty if the AMIT has an under or over for a base year resulting from their (or their agent's) recklessness or intentional disregard of the law. This draft Guideline provides examples of behaviours which do not exhibit recklessness and intentional disregard of the law under section 288-115 in Schedule 1 to the *Taxation Administration Act 1953*.²

Date of effect

3. It is proposed that this draft Guideline will be finalised as a public ruling, effective for those who rely on it in good faith from when the Tax Laws Amendment (New Tax System for Managed Investment Trusts) Bill 2015 (the Bill) comes into effect. If the Bill is enacted as introduced, this will be for assessments for income years starting on or after:

- 1 July 2016, or
- if the trustee has made an irrevocable choice to apply the new tax system for its 2015-16 income year which starts on or after 1 July 2015 – 1 July 2015.

Meaning of recklessness and intentional disregard of the law

4. The Commissioner's interpretation of 'recklessness' and 'intentional disregard of the law' as used in Subdivision 284-B and section 286-75 are set out in Miscellaneous Taxation Ruling MT 2008/1 *Penalty relating to statements: meaning of reasonable care, recklessness and intentional disregard*. The interpretations discussed in MT 2008/1 apply equally to these terms as used in section 288-115.

What are the signs that an AMIT trustee has acted in a reckless manner?

5. In considering whether an AMIT trustee has acted in a reckless manner, the Commissioner will have regard, amongst other things, to whether or not the AMIT trustee has the following governance controls in place. The lack of any one of these controls is not of itself evidence of recklessness.

6. Relevant controls:

- A registered tax agent has reviewed your distribution calculations, and you supplied all of the relevant information to the agent.
- You have unqualified audited statutory accounts and/or a satisfactory external auditor's controls report covering your tax function, such as a GS 007 controls report.
- You have a properly resourced and qualified internal tax division.
- Your tax function, processes and controls are reviewed by an internal audit function. The Commissioner will consider the results of the review, together with any action you take, or do not take, in response to the review.

7. The Commissioner will have regard to the size and resources of the trustee in considering the level and type of relevant controls. For example, a small trustee with limited resources may rely more on external advisors than a large, highly resourced trustee with an internal tax team.

² All legislative references in this draft Guideline are to Schedule 1 to the *Taxation Administration Act 1953* as proposed to be amended by the Bill, unless context otherwise dictates.

Examples of trustee actions not exhibiting recklessness or an intentional disregard of the tax law

8. The Explanatory Memorandum to the the Bill provides the following examples of circumstances in which a trustee is not considered to have intentionally or recklessly disregarded the law.

9. A trustee is not considered to have intentionally or recklessly disregarded the law if, in working out estimates of the trust components of particular characters that are attributed to members, the trustee:

- uses published estimates of amounts expected to be received by the AMIT from third party funds
- requests and uses estimates of amounts the AMIT expects to receive from third party funds from those funds' managers, or
- makes reasonable estimates of the distribution yield and tax components based on historical yield and tax component data.

10. Published estimates include estimates included in notices issued pursuant to section 12-395. Historical yield and tax component data would include prior year AMIT member annual statements (AMMA statements) or tax statements.

11. In addition, the Commissioner does not generally consider that an AMIT has recklessly or intentionally disregarded the law in the following circumstances:

- (i) An under or over is caused by limitations within existing, legacy (that is, one inherited by the acquirer of a business) or new IT systems, including limitations arising from information supplied by third parties (for example, stapled securities where pricing data is supplied at a stapled security level). This exception, however, does not apply when:
 - the IT system limitation could be fixed at reasonable cost (considering the size of the errors)
 - the errors could be corrected using information that is reasonably available, and at reasonable cost (again considering the size of the errors), or
 - a known error is perpetuated in, or introduced to, a newly created system (having regard to the cost of fixing the system limitation and size of the errors).
- (ii) There is uncertainty regarding the correct tax treatment of an item and the AMIT trustee has adopted a position with a reasonable basis after making appropriate enquiries, such as seeking external advice and researching authoritative sources.
- (iii) An under or over is attributable to a misclassification that does not affect the tax liability of a member.

Example: An amount of foreign source income is incorrectly classified as domestic source income. The relevant trust components are wholly attributed to Australian resident members of the AMIT, and the members' income tax liabilities are the same as they would have been had the income not been misclassified.
- (iv) A variance arises due to circumstances beyond the control of the AMIT trustee.

Example: An underlying AMIT or unit trust reissues its AMMA or tax statement to a second AMIT after the second AMIT has finalised its own AMMA for the same year, and rather than reissue its own AMMA statements for the base year, the second AMIT recognises the under or over in a discovery year.
- (v) Overs and unders that arise due to the rounding of distribution components in the systems used to calculate determined trust components, or in the systems used to calculate and prepare AMMA statements.

- (vi) Not following ATO public rulings, determinations or ATO Interpretative Decisions where the taxpayer is able to establish a reasonably arguable position for the treatment they adopt that is inconsistent with the ATO position.
- (vii) The way the trustee applied the relevant taxation law agreed with general administrative practice under that law.

Remission of tax

12. The Commissioner has the power under section 298-20 to remit all or part of the penalty imposed under section 288-115.

13. In deciding whether to remit part or all of the penalty, the Commissioner will have regard to offsetting unders and overs within an AMIT, or class of AMIT where each class is treated as a separate AMIT. Offsetting unders and overs arise where the unders and overs are attributable to a single act of recklessness or intentional disregard. For example, a trustee adopts a reckless position on the tax treatment of an amount of income which results in an under of one assessable income character and an over of equal amount in a different assessable income character.

Your comments

14. You are invited to comment on this Draft Law Companion Guideline including the proposed date of effect. Please forward your comments to the contact officer by the due date.

Due date: Friday, 15th January 2016
Contact officer: David White
Email address: David.White2@ato.gov.au
Telephone: (03) 9285 1574
Address: Australian Taxation Office
GPO Box 9977
Melbourne VIC 3001

References

ATOlaw topic(s)	Income tax ~~ Trusts ~~ Other
Legislative references	TAA 1953 TAA 1953 Sch 1 Subdiv 284-B TAA 1953 Sch 1 286-75 TAA 1953 Sch 1 288-115 TAA 1953 Sch 1 298-20 ITAA 1997 ITAA 1997 12-395 ITAA 1997 Div 276
Other references	Explanatory Memorandum to Tax Laws Amendment (New Tax System for Managed Investment Trusts) Bill 2015 Miscellaneous Taxation Ruling MT 2008/1 <i>Penalty relating to statements: meaning of reasonable care, recklessness and intentional disregard</i>
ATO references	