MT 2011/D3 - Administrative penalties: voluntary disclosures

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Draft Miscellaneous Taxation Ruling

Administrative penalties: voluntary disclosures

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This publication provides you with the following level of protection:

This publication is a draft for public comment. It represents the Commissioner's preliminary view about the way in which a relevant taxation provision applies, or would apply to entities generally or to a class of entities in relation to a particular scheme or a class of schemes.

You can rely on this publication (excluding appendixes) to provide you with protection from interest and penalties in the following way. If a statement turns out to be incorrect and you underpay your tax as a result, you will not have to pay a penalty. Nor will you have to pay interest on the underpayment provided you reasonably relied on the publication in good faith. However, even if you don't have to pay a penalty or interest, you will have to pay the correct amount of tax provided the time limits under the law allow it.

What this Ruling is about

1. This draft Ruling outlines the Commissioner's interpretation of section 284-225 of Schedule 1 to the *Taxation Administration Act 1953* (TAA). Specifically, it outlines the circumstances under which:

- a penalty otherwise attracted will be reduced to nil;
- a penalty otherwise attracted will be reduced by 80%; and
- a penalty otherwise attracted will be reduced by 20%.

2. This draft Ruling also provides guidelines on how the discretion in subsection 284-225(5) of Schedule 1 to the TAA may be exercised. In providing these guidelines, there is no intention to lay down conditions that may restrict the exercise of the Commissioner's discretion. Nor does the draft Ruling represent a general exercise of the Commissioner's discretion. Rather, the guidelines are provided to assist tax officers in determining when the discretion should be exercised and to help ensure that entities do not receive inconsistent treatment. The guidelines also inform entities of the principles that tax officers will apply in considering the exercise of the discretion.

3. This draft Ruling also outlines the Commissioner's interpretation of some of the important concepts in section 284-225 of Schedule 1 to the TAA, specifically:

- what constitutes 'an examination … of your affairs relating to a taxation law for a relevant period';

- when an entity will be taken to have been told that an examination is to be conducted of its affairs;
- the meaning of 'voluntarily tell' in the context of each subsection;
- the meaning of 'a significant amount of time or significant resources' for the purposes of subsection 284-225(1) of Schedule 1 to the TAA; and
- principles regarding the making of a voluntary disclosure.

4. This draft Ruling does not consider the application of section 284-225 of Schedule 1 to the TAA to shortfall amounts relating to the tourist refund scheme under Division 168 of the *A New Tax System (Goods and Services Tax) Act 1999* (GST Act) or Division 25 of the *A New Tax System (Wine Equalisation Tax) Act 1999*.

5. This draft Ruling does not consider the guidelines for the exercise of the Commissioner's discretion under section 298-20 of Schedule 1 to the TAA to remit the penalty otherwise attracted – see Law Administration Practice Statement PS LA 2006/2, which contains guidelines for the remission of administrative penalty imposed under subsection 284-75(1) of Schedule 1 to the TAA.

6. This draft 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).

7. This draft Ruling does not deal with whether or not an entity will be prosecuted where they have made a voluntary disclosure. Such decisions are made by the Director of Public Prosecutions (DPP). Referrals to the DPP will be made in accordance with the prosecution policy of the Australian Taxation Office (ATO).[1]

8. The approved form for voluntary disclosures can be found under the Forms section on the ATO website.[2]

9. All legislative references in this draft Ruling are to Schedule 1 of the TAA, unless otherwise indicated.

10. A number of expressions used in the relevant legislative provisions are referred to in this draft Ruling. These expressions are defined in paragraphs 114 to 131 of this draft Ruling.

[1] A hyperlink to the ATO's prosecution policy is provided in the 'Other references' section at the conclusion of this draft Ruling.
[2] A hyperlink to the website is provided in the 'Other references' section at the conclusion of this draft Ruling.

Date of effect

11. When the final Ruling is issued, it is proposed to apply to voluntary disclosures made on or after 4 June 2010. However, the Ruling will not apply to taxpayers to the extent that it conflicts with the terms of a settlement of a dispute agreed to before the date of issue of the Ruling (see paragraphs 75 and 76 of Taxation Ruling TR 2006/10).

Previous ruling

12. This draft Ruling replaces Miscellaneous Taxation Ruling 2008/3. Accordingly, MT 2008/3 is withdrawn from the date of issue of this draft Ruling. However MT 2008/3 will continue to have application to voluntary disclosures made before 4 June 2010. To the extent that the Commissioner's views in that Ruling still apply in the context of voluntary disclosures made on or after 4 June 2010, they have been incorporated into this draft Ruling.

Background

Legislative framework

13. A reduction in penalty otherwise applicable, for making a voluntary disclosure, was first introduced in the former penalty regime in Part VII of the ITAA 1936.[3] Section 226Y of the ITAA 1936 provided for a 20% reduction in penalty where the entity made a voluntary disclosure after being notified of a tax audit in relation to a year of income, and the disclosure could reasonably be estimated to have saved the Commissioner significant time or resources. An 80% reduction (or full reduction if the shortfall was less than $1,000) applied under section 226Z of the ITAA 1936 where the voluntary disclosure was made before notification of a tax audit. Section 226ZA of the ITAA 1936 contained a discretion for the Commissioner to treat a disclosure made after being notified of a tax audit as being made before being notified, thus entitling the entity to the greater reduction in penalty. Similar provisions also existed for penalties in respect of tax avoidance schemes[4] and franking tax shortfalls.[5]

14. These provisions do not apply to statements made in relation to the 2000-01 and later income years and were replaced by Division 284 of Part 4-25, specifically by section 284-225.

[3] Under the penalties regime for false and misleading statements which predated the enactment of Part VII of the ITAA 1936 and self assessment, whether the entity had made a voluntary disclosure was a factor taken into account in the exercise of the Commissioner's discretion to remit the penalty that was automatically imposed.
[4] Sections 226D, 226E and 226F of the ITAA 1936.
[5] Sections 160ARZJ, 160ARZK and 160ARZL of the ITAA 1936.

15. The uniform administrative penalty regime, contained in Part 4-25, applies from 1 July 2000 in relation to:

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

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

17. 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, goods and services tax (GST) and pay as you go (PAYG) withholding and instalments.

18. Broadly, the administrative penalties that arise under Division 284 relate to statements and schemes. Under Part 6 of Schedule 6 to the *Tax Laws Amendment (2010 Measures No. 1) Act 2010*, significant amendments were made to Division 284 with effect from 4 June 2010. The purpose of the amendments was to extend the circumstances which attract a penalty under Division 284.

19. Prior to 4 June 2010, the penalty for making a false or misleading statement (under subsection 284-75(1)) was limited to statements which resulted in a shortfall amount. However, from 4 June 2010 the requirement for the statement to result in a shortfall amount was removed, and base penalty amounts were introduced for false or misleading statements that do not result in a shortfall amount.

20. A number of consequential amendments were also made, including significant amendments to section 284-225. Although the operation of section 284-225 (see paragraphs 23 to 26 of this draft Ruling) remained unchanged, the consequential amendments:

- replaced the statutorily defined term ‘tax audit’ with ‘examination … of your affairs relating to a taxation law’;
- removed the reference to ‘for an accounting period’ relating to shortfall amounts and scheme shortfall amounts;
- replaced the phrase ‘for that [accounting] period or a period that includes that period’ with ‘for a relevant period’ in the context of examinations; and

- introduced a reduction of penalty to nil where the entity voluntarily tells the Commissioner, in accordance with subsection 284-225(2), about the false or misleading nature of a statement that does not result in a shortfall amount.

21. From 4 June 2010, Division 284 imposes a penalty where an entity:

- makes a statement to the Commissioner[6] 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 accurately, and the Commissioner determines the liability without the assistance of the document – subsection 284-75(3);
- makes a statement to an entity, other than the Commissioner,[7] which is or purports to be one required or permitted under a taxation law and which is false or misleading in a material particular – subsection 284-75(4); or
- enters into a scheme to get a scheme benefit – section 284-145.

22. If an entity is liable to an administrative penalty under Division 284, then under subsection 298-30(1) the Commissioner must make an assessment of the amount of the penalty. The assessment is made in accordance with the formula described in sections 284-85 (for penalties under section 284-75) and 284-155 (for penalties under section 284-145) as follows:

- calculate the base penalty amount under subsection 284-90(1) or section 284-160 respectively; and
- increase (section 284-220) or reduce (section 284-224 or section 284-225) the base penalty amount if certain conditions are satisfied.

23. Section 284-225 provides for a reduction of the base penalty amount, imposed under Division 284, for voluntary disclosures.

[6] Or a person exercising powers or performing functions under a taxation law.
[7] Or a person exercising powers or performing functions under a taxation law.

24. The base penalty amount will be reduced by 20% where an entity voluntarily tells the Commissioner in the approved form about a shortfall amount, a scheme shortfall amount or the false or misleading nature of a statement *after* being told by the Commissioner that an examination of its affairs relating to a taxation law for a relevant period (referred to in this draft Ruling as 'an examination') is to be conducted. Telling the Commissioner must reasonably be estimated to have saved the Commissioner significant time or resources in the examination.[8]

25. Where an entity voluntarily tells the Commissioner in the approved form about a shortfall amount, a scheme shortfall amount or the false or misleading nature of a statement *before the earlier of*:

- the day the entity is informed by the Commissioner that an examination is to be conducted; or
- the day by which the Commissioner, in a public statement, requests a voluntary disclosure to be made about a particular scheme or transaction that applies to the entity's affairs;

the base penalty amount will be reduced by 80% (unless the disclosure relates to a shortfall amount that is less than $1,000 or a false or misleading statement that does not result in a shortfall amount, in which case it is reduced to nil).[9]

26. Furthermore, where an entity voluntarily tells the Commissioner in the approved form about a shortfall amount, a scheme shortfall amount or the false or misleading nature of a statement *after* being notified by the Commissioner of an examination, the Commissioner has a discretion under subsection 284-225(5) to treat the voluntary disclosure as if it was made *before* the entity was notified of the examination.

27. A flow chart showing the operation of section 284-225 is included at Appendix 2 of this draft Ruling.

28. In addition to the statutory reduction under section 284-225, the Commissioner also has a general power to remit penalty, either in full or in part, under section 298-20. PS LA 2006/2 provides guidelines for the exercise of the Commissioner's remission power in relation to penalty imposed under subsection 284-75(1).

[8] Subsection 284-225(1).
[9] Subsections 284-225(2), 284-225(3), 284-225(4) and 284-225(4A).

Purpose of the voluntary disclosure provision

29. The purpose of the provision giving a reduction in penalty otherwise attracted is to encourage the making of voluntary disclosures by entities. This is the guiding principle to be considered in applying the provision. While each case will be governed by its own facts, in borderline cases the benefit of any doubt should generally be given to the entity. However, a balance must be struck between encouraging voluntary disclosures and not rewarding entities which, hoping to avoid detection, defer making disclosures until such time as it becomes obvious that ATO activity is about to uncover a shortfall amount, a scheme shortfall amount or the false or misleading nature of a statement.

30. Section 284-225 provides substantial incentives for entities to review their affairs and make a voluntary disclosure about any shortfall amount or scheme shortfall amount, or the false or misleading nature of any statement, before the Commissioner tells them that an examination is to be conducted. The 80% reduction in penalty also acknowledges that entities that make a voluntary disclosure without being prompted by direct action from the Commissioner should receive a substantially greater reduction than those who defer the making of disclosures until the Commissioner has informed the entity that an examination is to be conducted of its affairs.

Ruling

Principles regarding the operation of section 284-225

31. The level of any reduction in penalty is dependent on when a voluntary disclosure is made. Generally, the reduction will depend on whether the entity has made the voluntary disclosure before or after it is notified by the Commissioner that an examination is to be conducted of its affairs. However, if the Commissioner makes a public statement requesting entities to make a voluntary disclosure by a particular day, then the relevant point in time is before the earlier of:

- the day the entity is told by the Commissioner that an examination is to be conducted; or
- the day by which the Commissioner, in the public statement, requests the voluntary disclosure to be made.

32. For a public statement to be relevant for the purposes of section 284-225, it must:

- be a public statement made by the Commissioner;
- invite voluntary disclosures about a scheme or transaction that applies to the entity's affairs; and

- include a date by which such voluntary disclosures are to be made.

When does the reduction to nil apply?

33. A reduction to nil under section 284-225 can only apply in relation to shortfall amounts or false or misleading statements that do not result in a shortfall amount. It does not apply in relation to scheme shortfall amounts.

34. A penalty otherwise attracted is reduced to nil if the disclosure:

(i) is made before the earlier of:

- the day the entity is informed by the Commissioner that an examination is to be conducted; or
- the day by which the Commissioner, in a public statement, requests the voluntary disclosure to be made;

(ii) is in the approved form;

(iii) is made voluntarily; and

(iv) either:

- discloses a shortfall amount of *less than* $1,000; or
- relates to a false or misleading statement that does not result in a shortfall amount.[10]

35. Where an entity makes more than one disclosure about a shortfall amount in respect of a particular period, the disclosures should be added together to determine whether the $1,000 threshold has been exceeded for that period.

Example 1 – calculation of the $1,000 threshold

36. *Yuki makes a disclosure of a shortfall amount of income tax for an income year of less than $1,000 and an amended assessment is issued. The base penalty amount in relation to the shortfall amount was reduced to nil because of the voluntary disclosure made. Yuki then makes another disclosure of a shortfall amount of income tax in relation to the same income year so that the total shortfall amount disclosed for the period is equal to or more than $1,000.*

37. *As the total shortfall amount disclosed for the income year is $1,000 or more, the penalty reduction provided in relation to the first disclosure would need to be revised.*

[10] Subsections 284-225(2), 284-225(3) and 284-225(4A).

When does the automatic 80% reduction apply?

38. A penalty otherwise attracted is reduced by 80% if the disclosure:

(i) is made before the earlier of:

- the day the entity is informed by the Commissioner that an examination is to be conducted; or
- the day by which the Commissioner, in a public statement, requests the voluntary disclosure to be made;

(ii) is in the approved form;

(iii) is made voluntarily; and

(iv) either:

- relates to a scheme shortfall amount; or
- discloses a shortfall amount of $1,000 or more.[11]

When does the 20% reduction apply?

39. Notwithstanding that an entity has been told by the Commissioner that an examination will be conducted, the entity may still volunteer information to the Commissioner that will assist the completion of the examination. The penalty otherwise attracted in this situation will be reduced by 20% if the disclosure:

(i) is made after the entity has been informed by the Commissioner that an examination is to be conducted;

(ii) is made in the approved form;

(iii) is made voluntarily; and

(iv) can reasonably be estimated to have saved the Commissioner a significant amount of time or resources in the examination.[12]

40. The 20% reduction will apply where an entity makes a voluntary disclosure about a matter *after* being notified that an examination is to be conducted but *before* detailed enquiries into the matter have commenced and the disclosure enables:

- a correct adjustment of the tax-related liability to be made, in the case of shortfall amounts and scheme shortfall amounts; or

[11] Subsections 284-225(2) to 284-225(4).
[12] Subsection 284-225(1).

- the correction of the false or misleading nature of a statement, and any consequences that resulted from making the false or misleading statement, where the false or misleading statement did not result in a shortfall amount.

41. The timing and nature of the disclosure should be such that it can be reasonably estimated to have saved significant time or resources in the examination.

The Commissioner's discretion to treat a disclosure as having been made before the entity is informed of an examination

42. If an entity voluntarily tells the Commissioner about a shortfall amount, a scheme shortfall amount or the false or misleading nature of a statement *after* being notified that an examination is to be conducted the Commissioner may, under subsection 284-225(5), if the Commissioner considers it appropriate in all the circumstances, treat the disclosure as if it was made before the Commissioner informed the entity that the examination was to be conducted.

43. The effect of the exercise of the discretion is that the penalty otherwise attracted will be reduced by 80% (unless the disclosure relates to a shortfall amount that is less than $1,000 or a false or misleading statement that does not result in a shortfall amount, in which case the penalty is reduced to nil).

44. One of the purposes of the discretion is to ensure that an entity is not improperly denied the benefit of the 80% or full reduction in penalty because of a literal application of the law, such as the application of the broad meaning of the phrase 'examination … of your affairs'. The Commissioner's interpretation of what constitutes an examination that is relevant for the purposes of subsection 284-225(5) is outlined at paragraphs 46 to 69 of this draft Ruling. As the meaning is so broad, there may be some circumstances where it would be harsh not to allow the higher reduction.

45. The principles relating to the exercise of the Commissioner's discretion under subsection 284-225(5), and examples illustrating those principles, are outlined in Appendix 1 of this draft Ruling.

Commissioner's interpretation of important concepts

What is 'an examination … of your affairs relating to a taxation law for a relevant period'?

46. The amount of reduction in penalty that an entity will be entitled to for making a voluntary disclosure will generally depend on whether the disclosure was made before or after 'the Commissioner tells you that an examination is to be made of your affairs relating to a taxation law for a relevant period'. Therefore, three requirements must be met in order for an examination to be relevant for the purposes of section 284-225:

- it must be an examination of the entity's affairs;
- the examination must relate to a taxation law; and
- the notification of the examination must specify the period under examination and the period must be a relevant period.

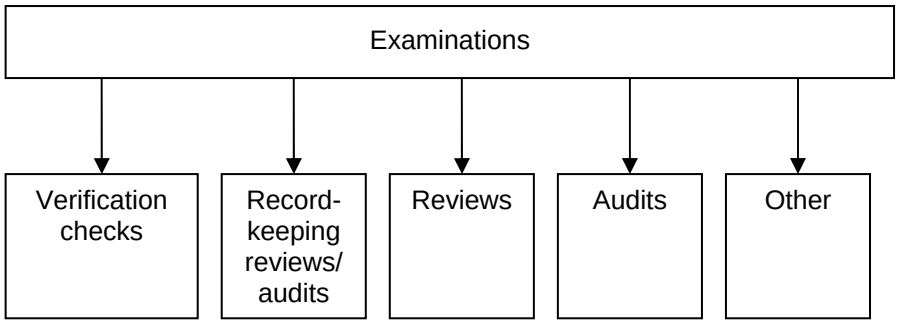
Examination … of your affairs

47. 'Examination' is not defined in Schedule 1 to the TAA and takes its ordinary meaning. The *Australian Oxford Dictionary*, 2004 Oxford University Press, Melbourne (the Australian Oxford Dictionary), defines 'examination' as meaning 'the act or an instance of examining'. 'Examine' is in turn defined in the Australian Oxford Dictionary as meaning to 'inquire into the nature or condition etc. of', 'look closely or analytically at'.

48. The term 'examination' is very broad, and covers not only traditional audits the Commissioner undertakes to ascertain an entity's tax-related liability but *any* examination of an entity's affairs.

49. The Commissioner undertakes a range of compliance activities which involve an examination of an entity's affairs including reviews, audits, verification checks, record-keeping reviews/audits and other similar activities (see Figure 1 below). However, the examination must relate to a particular entity's affairs and it therefore does not include activities that are merely educational in nature, for example a bulk mail out of letters reminding rental property owners of what can and can not be claimed as a tax deduction in relation to their rental property.

Figure 1 – examinations



50. An examination of 'your affairs' is not restricted to the calculation of an entity's tax-related liabilities. For example, an examination may be conducted of the entity's affairs in relation to debt collection, registration, reporting or other matters to the extent that the issues under examination relate to a taxation law.

51. In this context, in order for an examination to be relevant for the purposes of section 284-225 it must be an examination that involves more than the routine processing of forms or applications by the Commissioner.

Example 2 – examination of registration application

52. *Damon lodges an application to register for FBT. In the application, he specifies that he began providing fringe benefits on 1 September 2010.*

53. *The lodgement of the application by Damon, and the usual activities undertaken by a tax officer in processing the application, does not constitute an examination that is relevant for the purposes of section 284-225.*

54. *However, during the course of processing the application, the tax officer becomes concerned about the statement regarding when fringe benefits were first provided by Damon. The tax officer suspects that Damon may have provided fringe benefits to his employees from an earlier date and decides that the issue merits closer scrutiny. The tax officer therefore advises Damon that the Commissioner will be conducting a review of his application. This review will be an examination that is relevant for the purposes of section 284-225.*

Example 3 – examination of superannuation statements

55. *Arrelun Superannuation Fund lodges its member contributions statement for the year ended 30 June 2010. The Commissioner subsequently advises the fund that a review of the member contributions statement lodged for that income year is to be conducted.*

56. *Although the information in the statement relates to the members of the fund, the examination is still an examination of the superannuation fund's affairs because it is examining the fund's compliance with a legislative requirement under a taxation law to provide an accurate member contributions statement.*

57. The examination must also be ongoing at the time the voluntary disclosure is made for it to be relevant for the purposes of section 284-225. This is consistent with the purpose of the voluntary disclosure provisions (as outlined in paragraphs 29 and 30 of this draft Ruling) and the reference in paragraph 284-225(1)(c) to the voluntary disclosure saving the Commissioner a significant amount of time or significant resources in the examination. If the voluntary disclosure is made after the Commissioner has notified the entity that the examination has been completed, that examination will cease to be relevant for the purposes of section 284-225 and the entity will be taken to have made the disclosure before the notification of a relevant examination. Examples include a voluntary disclosure made after the completion of an audit, or after completion of a risk review but before the notification of a resulting audit.

Example 4 –disclosure made after completion of the examination

58. *The Commissioner notifies Calum that a risk review is to be undertaken in relation to supplies Calum treated as being GST-free in the period 1 July 2009 to 30 June 2010.*

59. *The risk review is conducted. Calum is then advised that the risk review has been completed, and that he will be advised in due course if he has been selected for an audit. After the completion of the risk review, but before Calum receives any notification of an audit, Calum discloses that the supplies he treated as being GST-free should have been taxable. As the disclosure was made after the end of the risk review examination, and before being notified of any other examination, the disclosure is regarded as having been made before the notification of a relevant examination and will therefore be considered under subsection 284-225(2).*

60. Because the phrase 'examination … of your affairs' is so broad it may result in circumstances where it is harsh to not allow the higher reduction in penalty, for example where the Commissioner is merely identifying and/or assessing risks. In these cases, the Commissioner will generally exercise the discretion under subsection 284-225(5) (see paragraph 133 in Appendix 1 of this draft Ruling), the effect of which is to provide the entity with an 80% or full reduction in the penalty otherwise attracted.

'Relating to a taxation law'

61. The Australian Oxford Dictionary relevantly defines 'relate' as meaning 'bring into relation (with one another); establish a connection between'. As such, there must be some connection between the examination and a taxation law.

62. Furthermore, an examination will only be relevant for the purposes of section 284-225 where it relates to the same taxation law as the voluntary disclosure, unless concurrent examinations are being undertaken. For example, an examination in relation to income tax will not be relevant in relation to a voluntary disclosure made about a shortfall amount of GST (unless concurrent examinations are being undertaken). See also paragraph 92 of this draft Ruling.

63. The Australian Customs and Border Protection Service (Customs) also performs certain functions on behalf of the Commissioner in relation to taxable importations, including the collection of relevant tax-related liabilities. As such, examinations of taxable importations undertaken by Customs officers will also be relevant for the purposes of section 284-225, to the extent that the examination relates to the importer's liability under a taxation law, for example GST.

'For a relevant period'

64. Section 284-225 refers to the entity being told of an examination in relation to a 'relevant period'. As such, examinations will only be relevant, for the purposes of section 284-225, where the notification of the examination includes the relevant period or periods being examined.

65. A relevant period does not have to be an accounting period. It can be any period, including part of an accounting period, multiple accounting periods or even just a single day or hour.

Example 5 – relevant period for taxable importations

66. *Customs intends to conduct an examination into import declaration JJREPWAAF, a taxable importation made by Import Right Pty Ltd on 17 February 2011. The examination will be relevant for the purposes of section 284-225 if the notification of the examination includes the day, or even a shorter period, within which the taxable importation took place.*

Example 6 – relevant period for a false or misleading statement that does not result in a shortfall amount

67. *Beverley lodges an application to cancel her GST registration from 1 January 2011, on the basis that her business stopped operating on a GST registered basis from that date. She lodges the application on 31 January 2011.*

68. *The tax officer processing the application suspects that Beverley's business may still be operating on a GST registered basis, and wants to conduct an examination of the statement. The examination will be relevant for the purposes of section 284-225 if the notification of the examination refers to either:*

- *an examination being conducted 'in relation to the application to cancel your GST registration, lodged on 31 January 2011',; or*
- *an examination being conducted 'in relation to your eligibility to cancel your GST registration from 1 January 2011'.*

69. The period or periods specified in the notification of the examination must be relevant to the matter that is voluntarily disclosed. While it remains open for the Commissioner to look at other periods, the entity will be able to make a disclosure about those other periods. Until such time as the entity is specifically told by the Commissioner that an examination will cover those other periods, the disclosure will have been made before being told of a relevant examination.

When will an entity be taken to have been told that an examination is to be conducted?

70. The word 'tell' is not defined in the legislation and takes its ordinary meaning. The Australian Oxford Dictionary defines 'tell' to mean 'to make known; express in words; divulge'. An entity will be treated as having been told that an examination is to be conducted when the Commissioner first makes contact with the entity or their representative about the examination. The notification of the examination may be made in writing or orally.

71. It should be clear on the face or tenor of the communication that an examination is to be conducted in respect of the entity's affairs. An entity will not have been told that an examination is to be conducted if the Commissioner's actions create no more than a suspicion that such an examination is to be conducted.[13] The use of the word 'examination' is not necessary; terms such as 'under review', 'under audit' or 'checking this information' would suffice.

What is the meaning of 'voluntarily tell'?

72. This expression is not defined in the legislation and takes its ordinary meaning. The word 'voluntary' is defined in the Australian Oxford Dictionary as 'done, acting, or able to act of one's own free will; not constrained or compulsory, intentional'. It is seen as an act done without persuasion or compulsion on the part of the Commissioner.

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[13] *Lawrence v. Federal Commissioner of Taxation* [2008] FCA 1497; 2008 ATC 20-052; (2008) 70 ATR 376.

73. A disclosure will not be regarded as being made voluntarily where the entity merely 'came clean' when caught. In other words, where the facts or reasonable inferences indicate that the entity:

- was aware of the shortfall amount, the scheme shortfall amount or the false or misleading nature of the statement; and
- would have been highly unlikely to have made the disclosure had it not become aware the Commissioner had uncovered, or was about to uncover, the shortfall amount, scheme shortfall amount or false or misleading nature of the statement (this includes where an entity intentionally disregards a taxation law).

74. However, mere suspicion that the entity would not have come forward will not be sufficient. In addition, the fact that the Commissioner has notified the entity that an examination will be conducted in relation to a particular issue, or that an issue has been identified as a high risk, will not, of itself, mean that a disclosure in relation to that issue is not made voluntarily.

Example 7 – disclosure not made voluntarily

75. *Frank operated a legal escort business. The Australian Federal Police executed search warrants at the premises from which the business was conducted and discovered the concealment of extensive amounts of cash. Tax officers were also in attendance. As a result, the ATO gained possession of the books of account which contained detailed records of the undeclared cash amounts.*

76. *After the execution of the search warrants, but before the ATO contacted Frank or his representative, Frank instructed his accountants to disclose the existence of the cash profits.*

77. *Although the disclosure was made prior to the Commissioner notifying Frank of an examination, the facts indicate that Frank was well aware that the Commissioner was about to uncover the shortfall amount, and it is reasonable to infer that he would not otherwise have made the disclosure. Furthermore, the Commissioner was already in possession of all of the information necessary to determine the correct tax-related liabilities. As such, the disclosure is not considered to have been made voluntarily.*

Example 8 – disclosure made voluntarily despite intentional disregard

78. *Julie, the Chief Executive Officer for Mathanta Pty Ltd, discovers that Kathy, the company's tax manager, claimed significant input tax credits for the company in relation to the quarterly tax period ending 30 September 2010, for acquisitions that were never made. The company immediately discloses the resulting shortfall amount to the Commissioner. The Commissioner had not commenced any examinations into the affairs of the company.*

79. *Although the shortfall amount was caused by an intentional disregard of the law by an employee of Mathanta Pty Ltd, it is clear from the facts that the company has nevertheless disclosed the shortfall amount of its own volition. As such, the disclosure will be regarded as having been made voluntarily.*

80. As mentioned in paragraph 70 of this draft Ruling, the word 'tell' is not defined in the legislation and takes its ordinary meaning of 'to make known; express in words; divulge'. Accordingly, for an entity to receive a reduction in penalty under section 284-225 they must actually make a disclosure. Merely providing requested documents to the Commissioner or answering questions is not sufficient.

81. In order to qualify for a reduction in penalty under section 284-225, the entity must make, voluntarily, disclosures of information not otherwise known to the Commissioner. The information must relate to a shortfall amount or scheme shortfall amount (or part of it), or the false or misleading nature of a statement, not already identified by the Commissioner. The information must also be provided in the approved form.

82. Where the Commissioner has already identified that there is a shortfall amount or a scheme shortfall amount, or has identified that a statement is false or misleading, and tells the entity of those findings, the entity can not be said to be making a voluntary disclosure where they merely:

- agree with what the Commissioner has already identified; or
- confirm a lesser shortfall amount or scheme shortfall amount.

Example 9 – no disclosure where the Commissioner has already identified a shortfall amount

83. *The ATO conducts a routine data-matching exercise in relation to interest income. Raj is identified as having omitted $3,000 of interest income from her 2010 income tax return. The Commissioner informs Raj of the omitted interest and the commencement of an audit in relation to the 2010 income year. Raj confirms the ATO's findings.*

84. *The confirmation by Raj of the ATO's findings does not qualify for a reduction in penalty as she has not made a disclosure but is merely confirming what the Commissioner has already identified.*

Example 10 – entity advises of lesser shortfall amount

85. *The ATO receives information from a third party that Kate made a capital gain in the 2010-11 income year in relation to the disposal of an asset. The ATO is given sufficient information to quantify the capital gain made. The Commissioner notifies Kate of the findings and of the commencement of an audit in relation to her income tax liability for the 2010-11 income year.*

86. *Kate responds to the notice and advises that she has a carried forward capital loss that will offset part of the capital gain. As such, the shortfall amount is less than that identified by the Commissioner.*

87. *Kate will not qualify for a reduction in penalty as she has not made a disclosure about a shortfall amount that has not already been identified by the Commissioner.*

Example 11 – disclosure over and above amount identified by the Commissioner

88. *The ATO identifies that Benton has a shortfall amount of $10,000 in PAYG withholding amounts for the June 2011 quarter. The Commissioner informs Benton of the shortfall amount and the commencement of an audit in relation to his PAYG withholding liability for that quarter. Benton confirms the ATO's findings but advises that the actual shortfall amount is $12,000. The tax officer determines that the disclosure was made voluntarily and that it saved significant resources for the Commissioner.*

89. *The confirmation by Benton of the $10,000 shortfall does not qualify for a reduction in penalty, as the Commissioner had already identified that part of the shortfall amount. However, Benton will be entitled to a 20% reduction in penalty in relation to the additional $2,000 disclosed, as he has voluntarily made a disclosure about part of a shortfall amount which was unknown to the Commissioner, and the disclosure saved the Commissioner a significant amount of resources.*

90. The expression 'voluntarily tell' is used in subsections 284-225(1), 284-225(2) and 284-225(5), and its meaning must be read in the context in which it appears. There are subtle differences in the meaning of 'voluntarily tell' in each of these subsections.

'Voluntarily tell' under subsection 284-225(2)

91. Subsection 284-225(2) applies only to an entity that does something of their own initiative, without prompting or apprehended pressure from the Commissioner.[14] In this context, 'voluntarily tell' means an unprompted disclosure in the sense that the disclosure is made before the earlier of:

- direct contact with the entity or the entity's representative by the Commissioner (in relation to the taxation law and period to which the disclosure relates); or
- before the date mentioned in a relevant public statement made by the Commissioner.

92. A disclosure made after the notification of an examination in relation to one taxation law only is regarded as having been made voluntarily if the disclosure relates to another taxation law. For example, if an entity is notified by the Commissioner of a GST examination, and a disclosure is made about a shortfall amount of income tax, that disclosure will be treated as being made voluntarily unless the entity has been advised that concurrent examinations of both taxes are being undertaken or paragraph 73 of this draft Ruling applies.

93. Similarly, disclosures relating to a period not under examination will be accepted as having been made voluntarily, unless paragraph 73 of this draft Ruling applies.

94. An entity will not be precluded from making a voluntary disclosure under subsection 284-225(2) merely because:

- there is an ATO project or review being conducted on an industry-wide or geographic basis and the entity is engaged in that industry or lives in the relevant geographic area;
- the entity's name is listed by the ATO for future audit; or
- particular compliance activities are listed in the ATO's annual Compliance Program.

'Voluntarily tell' under subsections 284-225(1) and 284-225(5)

95. In the context of subsections 284-225(1) and 284-225(5), 'voluntarily tell' takes on a subtly different meaning from that in subsection 284-225(2) because direct contact has been made by the Commissioner. However, the principle outlined in paragraph 73 of this draft Ruling still applies.

[14] *British American Tobacco Australia Services Limited v. Commissioner of Taxation* [2009] FCA 1550; 2009 ATC 20-155, at paragraph 107.

96. A voluntary disclosure in this sense assumes a level of cooperation and assistance by the entity that is above that ordinarily expected of an entity during the conduct of an examination. The publication *Taxpayers' charter – If you're subject to review or audit* (NAT 2558) outlines what is ordinarily expected of an entity during the conduct of an examination.

97. However, merely providing cooperation and assistance during the conduct of an examination does not of itself constitute a voluntary disclosure. As mentioned in paragraph 80 of this draft Ruling, the entity must in fact make a disclosure to be entitled to a reduction in penalty.

98. The requirement that the disclosure be made voluntarily is closely related to the requirement that the disclosure can reasonably be estimated to have saved the Commissioner a significant amount of time or significant resources in the examination.

99. A disclosure will also have been made voluntarily where it relates to a matter that is outside the scope of the examination.

What is 'a significant amount of time or significant resources' for the purposes of subsection 284-225(1)?

100. Subsection 284-225(1) requires not only that the entity voluntarily tell the Commissioner about a shortfall amount or scheme shortfall amount, but also that this disclosure can reasonably be estimated to have saved the Commissioner a significant amount of time or significant resources in the examination. This is an objective test.

101. The term 'significant' is not defined, and therefore takes its ordinary meaning. In *Re Applicant and Federal Commissioner of Taxation (Case 9/2009)* [2009] AATA 627; 2009 ATC 1-013; (2009) 76 ATR 671 the Administrative Appeals Tribunal held that the term 'must be construed in such manner that it means a period of time or resources in excess of that which is purely nominal'.[15]

102. A disclosure made early during an examination is more likely to result in a significant saving of time or resources than a disclosure made later, especially where the disclosure relates to a matter that will clearly be examined during the course of the examination. It should be noted that the actual time and resources spent on the examination does not in fact need to be less than was planned because of the disclosure that was made. It may be that the time saved is used in looking into other matters. What is required is that the disclosure made could be reasonably estimated to have saved a significant amount of time or resources in looking into the matter disclosed.

[15] J Block DP, at paragraph 61.

103. The reduced rates of penalty for disclosures made after notification of an examination are not attracted where the entity is simply courteous or co-operative in responding to specific requests for information. To attract the reduced rates the entity must make, voluntarily, disclosures of information not otherwise known to the Commissioner that could reasonably be expected to lead to a significant saving in time or resources.

Principles regarding the making of a voluntary disclosure

104. Unlike the former provisions under Part VII of the ITAA 1936, there is no statutory requirement that voluntary disclosures be given to the Commissioner in writing. Rather, the disclosure must be made in the approved form. The approved form for voluntary disclosures can be found under the Forms section on the ATO website.[16]

105. The entity does not need to disclose the precise amount of the shortfall amount or scheme shortfall amount. The Revised Explanatory Memorandum to the A New Tax System (Tax Administration) Bill (No. 2) 2000 states, at paragraph 1.129, that 'telling the Commissioner about the shortfall will require a taxpayer to disclose the relevant facts and other information to enable the Commissioner to adjust the tax-related liability.' There may be circumstances where it is not practicable for the entity to quantify every adjustment required, or the resulting shortfall amount or scheme shortfall amount. In these circumstances, it will be sufficient if the entity has done everything reasonably necessary to enable or assist the Commissioner to determine the shortfall amount or scheme shortfall amount, even if some further matters of detail still need to be clarified.

106. In the context of false or misleading statements that do not result in a shortfall amount, the entity will be required to disclose sufficient information to enable the Commissioner to:

- correct the false or misleading statement; and/or
- rectify any decisions made or action taken as a consequence of the entity making the false or misleading statement.

107. An entity may make a disclosure about one part of a shortfall amount or scheme shortfall amount but not other parts of a shortfall amount or scheme shortfall amount. This may be because the entity is only aware of part of the shortfall amount or scheme shortfall amount. Provided the disclosure of that particular part meets the requirements of section 284-225, the entity will be entitled to the reduced penalty rates on the part of the shortfall amount or scheme shortfall amount disclosed. The part or parts of the shortfall amount or scheme shortfall amount not disclosed will not receive any reduction in penalty.

[16] A hyperlink to the website is provided in the 'Other references' section at the conclusion of this draft Ruling.

108. The entity need not admit liability in respect of the shortfall amount or scheme shortfall amount disclosed, or admit that the statement they made was incorrect. The entity is eligible for the reduced penalty rates whether or not the entity maintains an opinion contrary to that of the Commissioner or disputes:

- the adjustment made by the Commissioner to the entity's tax-related liability; or
- any action taken, or not taken, by the Commissioner as a result of finding that a statement was false or misleading in a material particular.

Application of section 284-225 where an entity applies for a private ruling

109. Entities or their representatives can apply for a private ruling on the Commissioner's opinion about the way in which the law applies or would apply in their particular circumstances.[17]

110. Where an entity or their representative lodges an application for a private ruling, which:

- the Commissioner must deal with; and
- is not prompted by ATO action, either through the notification of an examination or the issue of a public statement inviting voluntary disclosures,

the application will be considered to be a voluntary disclosure, subject to the considerations in this draft Ruling about whether it is made voluntarily and the time at which it is made.

Application of section 284-225 in 'self amendment' cases

111. The Commissioner may accept statements made by entities in amendment requests for the purposes of making an assessment.[18] In relation to some taxes (for example GST), an entity may also make amendment requests by revising their previously lodged returns or activity statements. A 'self amendment' is any request for an amendment where the Commissioner accepts the statements without scrutiny. It includes the revision of returns or activity statements by entities themselves.

112. A request for a debit amendment, including a 'self amendment', which is not prompted by ATO action, either through the notification of an examination or the issue of a public statement inviting voluntary disclosures, will usually be considered a voluntary disclosure, subject to the considerations in this draft Ruling about whether it is made voluntarily and the time at which it is made.

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[17] See Division 359.
[18] For example, subsection 169A(1) of the ITAA 1936.

113. This principle will also apply where an entity has a reporting obligation, unrelated to a tax-related liability of the entity, and is able to correct a false or misleading statement made in respect of that obligation by simply lodging a revised statement.

Definitions

Approved form

114. Subsection 995-1(1) of the ITAA 1997[19] defines 'approved form' as having the meaning given by section 388-50 of Schedule 1 to the TAA.

115. Section 388-50 provides that a return, notice, statement, application or other document under a taxation law is in the approved form if, and only if:

- it is in the form approved in writing by the Commissioner for that kind of return, notice, statement, application or other document;
- it contains a declaration signed[20] by a person or persons as the form requires;
- it contains the information that the form requires, and any further information, statement or document as the Commissioner requires, whether in the form or otherwise; and
- for a return, notice, statement, application or document that is required to be given to the Commissioner – it is given in the manner that the Commissioner requires.

Base penalty amount

116. In the context of Division 284 of Schedule 1 of the TAA, subsection 995-1(1) of the ITAA 1997 states that the base penalty amount for calculating the amount of an administrative penalty is worked out under:

- section 284-90 of Schedule 1 of the TAA, where the penalty is for a false or misleading statement, or a position that is not reasonably arguable, and
- section 284-160 of Schedule 1 of the TAA, where the penalty relates to a scheme.

117. The base penalty amount is the starting point for the calculation of an administrative penalty.

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[19] Subsection 3AA(2) of the TAA provides that an expression used in Schedule 1 to the TAA has the same meaning as in the ITAA 1997.

[20] A signature includes an electronic or telephone signature if the document is being lodged electronically or by telephone respectively (see section 388-75).

Scheme

118. 'Scheme' is very widely defined in subsection 995-1(1) of the ITAA 1997. It means any arrangement, scheme, plan, proposal, action, course of action or course of conduct, whether unilateral or otherwise.

119. An arrangement is further defined in subsection 995-1(1) of the ITAA 1997 as any arrangement, agreement, understanding, promise or undertaking, whether express or implied, and whether or not enforceable (or intended to be enforceable) by legal proceedings.

Scheme shortfall amount

120. 'Scheme shortfall amount' is defined in subsection 995-1(1) of the ITAA 1997 as having the meaning given by section 284-150 of Schedule 1 of the TAA.

121. Section 284-150 provides that a scheme shortfall amount is the amount of the scheme benefit that you would, apart from the adjustment provision, have got from the scheme.

Shortfall amount

122. 'Shortfall amount' is defined in subsection 995-1(1) of the ITAA 1997 as having the meaning given by section 284-80 of Schedule 1 of the TAA.

123. Section 284-80 provides that a shortfall amount is the amount by which the relevant tax-related liability is less than, or the payment or credit is more than, it would otherwise have been.

Taxation law

124. 'Taxation law' is defined in subsection 2(1) of the TAA as having the meaning given by the ITAA 1997. Subsection 995-1(1) of the ITAA 1997 defines 'taxation law' as an Act of which the Commissioner has the general administration and any legislative instruments made under such an Act. It also includes part of an Act (and associated legislative instruments) to the extent that the Commissioner has the general administration of the Act. The *Tax Agent Services Act 2009* and regulations made under that Act are also included in the definition of 'taxation law'.

125. However, references to 'taxation law' in Subdivision 284-B of Schedule 1 to the TAA specifically exclude Excise Acts (as defined in subsection 995-1(1) of the ITAA 1997).[21]

[21] Each reference to 'taxation law' in Subdivision 284-B of Schedule 1 to the TAA is followed by the phrase '(other than *Excise Acts)'.

Tax-related liability

126. 'Tax-related liability' is defined in subsection 995-1(1) of the ITAA 1997 as having the meaning given by section 255-1 of Schedule 1 of the TAA.

127. Section 255-1 provides that a tax-related liability is a pecuniary liability to the Commonwealth arising directly under a taxation law (including a liability the amount of which is not yet due and payable).

128. Section 250-10 contains tables outlining various types of tax-related liabilities.

Taxable importation

129. 'Taxable importation' is defined in subsection 995-1(1) of the ITAA 1997 as having the meaning given by section 195-1 of the GST Act.

130. Section 195-1 of the GST Act in turn refers to subsections 13-5(1) and 114-5(1) of that Act. Under these provisions, an entity will make a taxable importation if:

- goods are imported and the entity enters the goods for home consumption, or
- one of the items in the table in subsection 114-5(1) of the GST Act applies.

131. However, an importation is not a taxable importation to the extent that it is a non-taxable importation.

Commissioner of Taxation
7 September 2011

Appendix 1 –The Commissioner's discretion in subsection 284-225(5)

This Appendix does not form part of the proposed binding public ruling.

Principles relating to the exercise of the Commissioner's discretion in subsection 284-225(5)

132. Tax officers must consider each case based on all of the relevant facts and circumstances, having regard to the purpose of the provision. The overriding principles are that the discretion should be exercised where it is fair and reasonable to do so and must not be exercised arbitrarily.

133. As a general rule, the Commissioner's discretion will be exercised in the following circumstances:

(i) where the Commissioner is merely identifying and/or assessing risks, for example a risk review, notwithstanding that this is considered to be an examination;[22]

(ii) where the disclosure is not within the scope of the examination as notified to the entity (that is, it is outside the risk(s) or issue(s) covered by the examination);[23]

(iii) where the tax officer invites the entity to make a voluntary disclosure within a specified period or by a specified date, and the entity makes a full disclosure within that period or by that date;

(iv) where, during the initial notification of the examination, the tax officer advises the entity that the examination will commence at a subsequent date (known as the formal date of commencement), and the entity makes a full disclosure on or before that date; or

(v) where a company is undertaking its own review of its affairs (often called 'a prudential audit') at the time the Commissioner notifies the entity of the examination and it could reasonably be concluded that the entity was going to disclose the outcome of its review irrespective of the Commissioner's examination.

134. However, the disclosure must still have been made voluntarily (see paragraphs 72 to 74 and 95 to 99 of this draft Ruling).

[22] See paragraph 49 of this draft Ruling.

[23] 'Scope' in this context does not include the taxation law or the period(s) covered by the examination. If an entity makes a voluntary disclosure that is not related to the taxation law or period(s) covered by the examination, the entity will have made the voluntary disclosure before notification of a relevant examination, under subsection 284-225(2) – see paragraphs 62 and 69 of this draft Ruling.

135. The discretion would not usually be exercised where the entity makes a voluntary disclosure after being notified of an examination which:

- is not about the identification or assessment of risk; and
- has been preceded by another examination (or examinations) involving the identification and assessment of risk in relation to the matter(s) disclosed where the entity was notified of that earlier examination.

136. Furthermore, the discretion cannot have practical effect where the entity makes a voluntary disclosure after being notified of an examination which has been preceded by a public statement issued by the Commissioner inviting voluntary disclosures by an earlier date in relation to the matter(s) disclosed. This is because the Commissioner's discretion only operates to treat the voluntary disclosure as having been made before the notification of the examination. In these circumstances, subsection 284-225(2) requires the voluntary disclosure to have been made before the earlier date mentioned in the public statement in order to attract the 80% or full reduction in penalty.

Examples

137. The operation of subsection 284-225(5) depends heavily on the facts of each case. The examples which follow are not designed to fetter the exercise of the Commissioner's discretion, but are for illustrative purposes only. They have been simplified to illustrate various aspects of the Commissioner's discretion under the subsection, and frequently use shortcuts in describing whether or not conditions for exercise of the discretion are met.

138. The examples are not intended to prescribe the level of information required to properly determine whether or not the discretion should be exercised. In practice, a higher level of detail would need to be examined to reach a conclusion on whether it is appropriate for the Commissioner to exercise the discretion. For this reason it would not be appropriate to make any of the examples part of the binding section of this public ruling.

Example 12 – exercise of the Commissioner's discretion where the disclosure relates to a matter outside the scope of the examination[24]

139. John, a sole trader, was advised that a record-keeping review was going to be conducted in relation to his business records for the 2009-10 income year to ensure that they complied with the relevant legislative requirements.

[24] Refer to subparagraph 133(ii) of this draft Ruling.

140. When the ATO auditor arrived to conduct the review, John provided a written statement that a capital expense had been incorrectly claimed as a repair in his 2009-10 income tax return. The Commissioner considers that the disclosure was made voluntarily.

141. A record-keeping review is an examination for the purposes of section 284-225. While the disclosure was made voluntarily after John had been notified of the record-keeping review, the auditor determines that it is unlikely that the shortfall amount would have been detected by the record-keeping review. The auditor also determines that there is no evidence that John only made the disclosure because the ATO was about to undertake a review. As such, the Commissioner exercises the discretion under subsection 284-225(5) to treat the disclosure as having been made before the notification of the examination.

Example 13 – exercise of the Commissioner's discretion where the disclosure relates to a matter outside the scope of the examination[25]

142. Jimback Pty Ltd, the head company of a consolidated group, was advised in July 2010 that an examination was going to be conducted of the consolidated group's income tax liability for the 2008-09 income year in relation to particular transactions made by Spatiro Pty Ltd and Gangupp Pty Ltd, subsidiary members of the consolidated group. Dankesehr Pty Ltd, another subsidiary member of the group, subsequently disclosed an error they had made which impacted on the consolidated group's income tax liability for the 2008-09 income year and it is unlikely that the error would have been detected during the examination.

143. The disclosure made would be considered to be outside the scope of the examination notified to the head entity, as the notification of the audit indicated that the transactions of Spatiro Pty Ltd and Gangupp Pty Ltd were the focus of the audit. As the disclosure was also made voluntarily and it was unlikely the error would have been discovered during the examination, the Commissioner exercises the discretion under subsection 284-225(5) to treat the disclosure as having been made before the notification of the examination.

Example 14 – exercise of the discretion where the entity is undertaking a prudential audit[26]

144. Merry Will Pty Ltd was notified in January 2011 that the Commissioner intended to conduct an audit of its income tax return for the 2009-10 income year. The company immediately wrote to the Commissioner advising that in November 2010 it had contracted with an accounting firm to conduct a prudential audit of its 2009-10 return, as part of its tax risk management strategy. Documents held by the company confirm this information. In February 2011 the company made a disclosure of an error in its 2009-10 return.

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[25] Refer to subparagraph 133(ii) of this draft Ruling.
[26] Refer to subparagraph 133(v) of this draft Ruling.

145. The company has a good compliance history and has previously made voluntary disclosures in respect of other returns.

146. Although the disclosures were made after the entity had been informed of the examination, the evidence suggests that the disclosures would have been made even if the company had not received notification of the examination. The evidence also indicates that the disclosures could be regarded as being made voluntarily. Accordingly, the Commissioner exercises the discretion under subsection 284-225(5) to treat the disclosure as having been made before the entity was informed of the examination.

Example 15 – exercise of the discretion where voluntary disclosure made prior to the formal date of commencement of the examination, application of principles to taxable importations[27]

147. In March 2011, Customs notifies Import Right Pty Ltd, an importer, that monitoring powers under section 214AB of the *Customs Act 1901* are to be exercised on 16 and 17 April 2011 to verify compliance with a Customs-related law.[28] The notice of intention to exercise monitoring powers states that import declaration AACTJTCKF from 2 February 2011 is to be audited.

148. On 2 April 2011 the importer advises Customs of an error which resulted in a shortfall amount of GST in the amount of $1,593.51. The importer advises that the error was identified due to the checking of the commercial documents relating to the goods prior to the commencement of the audit. The Customs officer accepts the importer's explanation for the discovery of the error.

149. The exercise of the monitoring powers, to the extent that it relates to the importer's liability under a taxation law (including the GST Act), constitutes an examination. As such, the voluntary disclosure of Import Right Pty Ltd has been made after the notification of an examination. However, as the disclosure was made voluntarily before the formal date of commencement of the examination (being 16 April 2011), the Commissioner exercises the discretion under subsection 284-225(5) to treat the disclosure as having been made before the notification of the examination.

Example 16 – exercise of the discretion where the Commissioner is merely identifying and assessing risks[29]

150. Pothar Pty Ltd was advised that a risk review was going to be conducted in relation to its FBT return for the 2010-11 year. At the time of this notification the Commissioner had not focussed attention on any specific risks.

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[27] Refer to subparagraph 133(iv) of this draft Ruling.
[28] The definition of 'customs-related law' in section 4B of the *Customs Act 1901* includes, for the purposes of this example, the GST Act as it relates to the importation of goods where the importation is subject to GST.
[29] Refer to subparagraph 133(i) of this draft Ruling.

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151. During the risk review, Pothar Pty Ltd identifies and discloses that several payments made to employees as a reimbursement of expenses were omitted from its 2010-11 FBT return. The Commissioner considers that the disclosure was made voluntarily.

152. As the Commissioner is examining the company's affairs, the risk review is regarded as being an 'examination' for the purposes of section 284-225. The disclosure has therefore been made after the notification of the examination. However, as the Commissioner is merely identifying and assessing risk at this stage, the Commissioner exercises the discretion to treat the disclosure as having been made before the notification of the examination.

Example 17 – no exercise of discretion where previous opportunity to make a voluntary disclosure during a risk review, exercise of discretion where subsequent voluntary disclosure outside scope of formal audit[30]

153. Aldaraan Enterprises Pty Ltd was advised that a transfer pricing risk review was going to be conducted in relation to the 2009-10 income year. The company did not make any disclosures during the conduct of this risk review.

154. At the conclusion of the risk review, Aldaraan Enterprises Pty Ltd is advised that a formal transfer pricing audit is going to be conducted in respect of that year. At that point, the company discloses a shortfall amount relating to transfer pricing issues.

155. In these circumstances, the Commissioner does not exercise the discretion to treat the disclosure as being made before the notification of the tax audit, as the company had previously been given a formal opportunity to make a voluntary disclosure during the risk review.

156. During the course of the formal transfer pricing audit Aldaraan Enterprises Pty Ltd discloses a shortfall amount in respect of claims for research and development expenditure which have no connection with the transfer pricing issues.

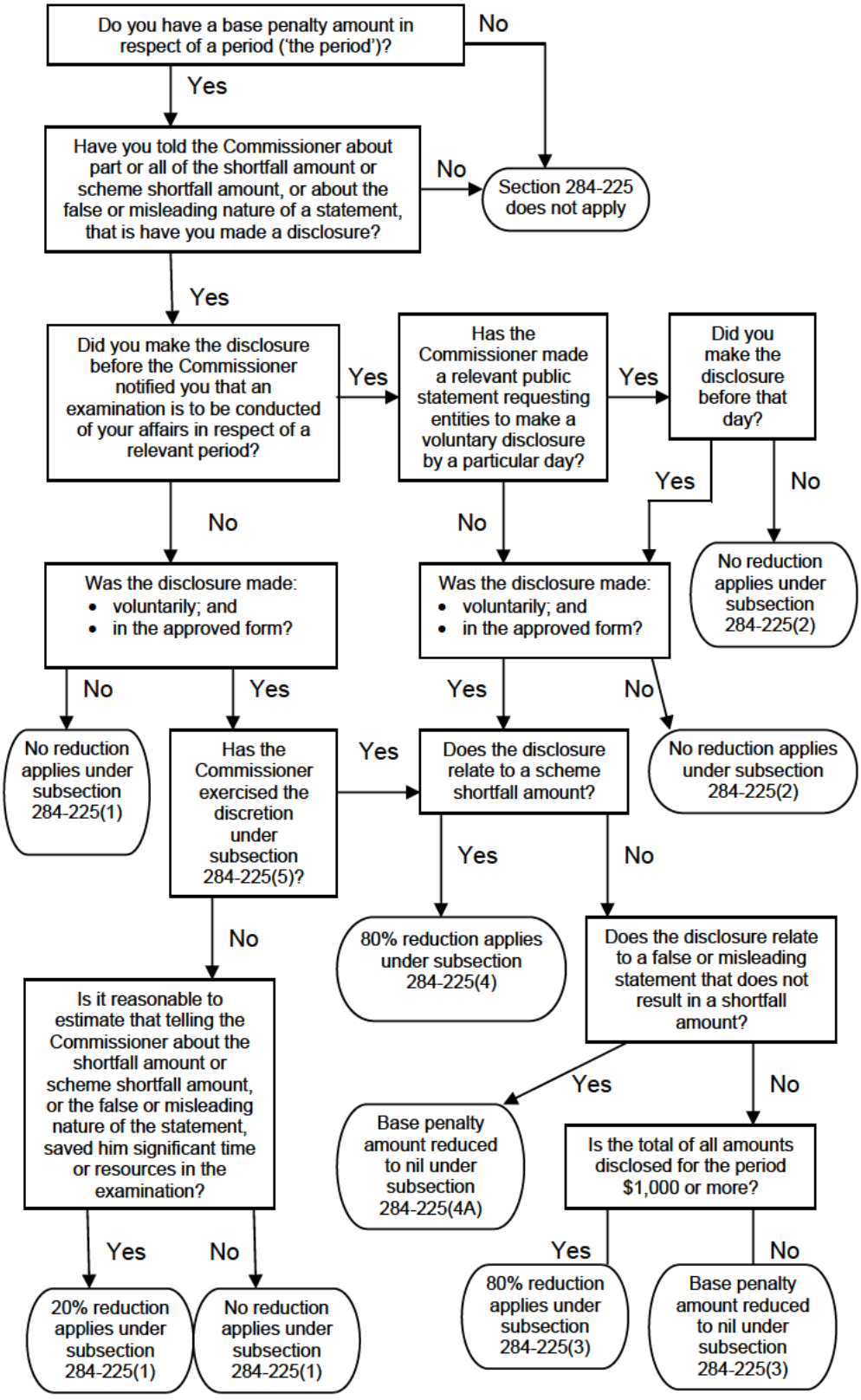
157. The Commissioner exercises the discretion under subsection 284-225(5) to treat the disclosure about the research and development expenditure claim as having been made before the notification of the tax audit since the disclosure was considered to be outside the scope of the transfer pricing audit.

[30] Refer to paragraph 135 of this draft Ruling.

Appendix 2 – Flow chart on the operation of section 284-225

This Appendix does not form part of the proposed binding public ruling.

158. The following is a flow chart demonstrating the operation of section 284-225.



Appendix 3 – Your comments

159. You are invited to comment on this draft Ruling. Please forward your comments to the contact officer by the due date.

160. A compendium of comments is also prepared for the consideration of the relevant Rulings Panel or relevant tax officers. An edited version (names and identifying information removed) of the compendium of comments will also be prepared to:

- provide responses to persons providing comments; and
- publish on the ATO website at www.ato.gov.au.

Please advise if you do not want your comments included in the edited version of the compendium.

Due date:	**21 October 2011**
Contact officer:	**Laurren Pamenter**
Telephone:	**(07) 3213 5720**
Facsimile:	**(07) 3213 5061**
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Email address:	**AdminBrisbane@ato.gov.au**

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References

Related Rulings/Determinations:
MT 2008/2; TR 94/3; TR 2006/10

Previous Rulings/Determinations:
MT 2008/3

Subject references:
- administrative penalty
- taxpayer disclosures
- voluntary disclosures

Legislative references:
- ANTS(WET)A 1999 Div 25
- ANTS(GST)A 1999
- ANTS(GST)A 1999 13-5(1)
- ANTS(GST)A 1999 114-5(1)
- ANTS(GST)A 1999 Div 168
- ANTS(GST)A 1999 195-1
- ITAA 1936 160ARZJ
- ITAA 1936 160ARZK
- ITAA 1936 160ARZL
- ITAA 1936 169A(1)
- ITAA 1936 Pt VII
- ITAA 1936 226D
- ITAA 1936 226E
- ITAA 1936 226F
- ITAA 1936 226Y
- ITAA 1936 226Z
- ITAA 1936 226ZA
- ITAA 1997 995-1(1)
- TAA 1953
- TAA 1953 2(1)
- TAA 1953 2(2)
- TAA 1953 3AA(2)
- TAA 1953 Sch 1 250-10
- TAA 1953 Sch 1 255-1
- TAA 1953 Sch 1 Pt 4-25
- TAA 1953 Sch 1 Div 284
- TAA 1953 Sch 1 Subdiv 284-B
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