


TD 2007/D4 - Miscellaneous taxes: does paragraph 284-220(1)(e) of Schedule 1 to the Taxation Administration Act 1953 apply to increase the base penalty amount applicable to a subsection 284-75(3) penalty where the entity was liable to the same penalty for a previous accounting period?

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This document has been finalised by MT 2007/1.



Draft Taxation Determination

Miscellaneous taxes: does paragraph 284-220(1)(e) of Schedule 1 to the *Taxation Administration Act 1953* apply to increase the base penalty amount applicable to a subsection 284-75(3) penalty where the entity was liable to the same penalty for a previous accounting period?

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Ruling

1. Yes. Where a penalty is imposed under subsection 284-75(3) of Schedule 1 to the *Taxation Administration Act 1953*¹ for an accounting period, paragraph 284-220(1)(e) applies to increase the base penalty amount by 20% if a penalty was imposed under that subsection for a previous accounting period.

Date of effect

2. When the final Determination is issued, it is proposed to apply both before and after its date of issue. However, the Determination will not apply to taxpayers to the extent that it conflicts with the terms of settlement of a dispute agreed to before the date of issue of the Determination (see paragraphs 75 and 76 of Taxation Ruling TR 2006/10).

¹ All legislative references in this Determination are to Schedule 1 to the *Taxation Administration Act 1953*.

TD 2007/D4

Commissioner of Taxation

4 April 2007

Appendix 1 – Explanation

① *This Appendix is provided as information to help you understand how the Commissioner's preliminary view has been reached. It does not form part of the proposed binding public ruling.*

Explanation

3. Subsection 284-75(3) imposes a liability to an administrative penalty if a person fails to lodge a return, notice or other document which is necessary to determine a tax-related liability, and the Commissioner determines the tax-related liability without the assistance of that document.
4. Section 298-30 requires the Commissioner to make an assessment of the amount of the administrative penalty. The amount of the penalty is the base penalty amount specified in subsection 284-90(1), unless the amount is increased under section 284-220 or reduced under section 284-225. For a penalty imposed under subsection 284-75(3), the base penalty amount is 75% of the tax-related liability concerned: see item 7 of subsection 284-90(1).
5. Subsection 284-220(1) states that the base penalty amount 'for your shortfall amount, or for part of it,' is increased by 20% in the circumstances listed in paragraphs 284-220(1)(a) to (e). Paragraph 284-220(1)(e) refers to a penalty arising under subsection 284-75(3) where the taxpayer had previously been liable to a penalty under that section in an earlier accounting period. However, an entity has a 'shortfall amount' only if an item in the table in subsection 284-80(1) applies to the entity. As none of the items in the subsection 284-80(1) table deals with the failure to give the Commissioner a return, notice or other document there is an apparent inconsistency in the language of subsection 284-220(1).
6. It is clear on the face of the provision that subsection 284-220(1) is intended to apply to increase the base penalty arising in the situation described in paragraph 284-220(1)(e). This is confirmed by the Explanatory Memorandum to the A New Tax System (Tax Administration) Bill (No. 2) 2000. Paragraphs 1.114 and 1.121 of the Explanatory Memorandum indicate that there are five situations where the penalty imposed on a shortfall amount for an accounting period may be increased. One of those situations is where a taxpayer has, in a previous accounting period, been penalised because they refused to give a return, statement or other document in which a statement can be made about a tax-related matter (that is, the situation described in paragraph 284-220(1)(e)).
7. If the words 'for your shortfall amount, or for part of it' are read as limiting the subsection to occasions where there is a shortfall amount, paragraph 284-220(1)(e) would never apply to increase the base penalty amount because the entity could never have a shortfall amount in such situations. In light of the clear intent of the legislation, the Commissioner does not accept that paragraph 284-220(1)(e) has no effect.

8. It is well settled that the object of statutory construction in every case is to ascertain legislative intent by reference to the language of the statute viewed as a whole. In doing so, one looks to 'the operation of the statute according to its terms and to legitimate aids to construction'.² '[I]f the language of a provision is clear and unambiguous, and consistent and harmonious with the other provisions of the enactment, and it can be intelligibly applied to the subject matter with which it deals' then a literal construction of the provision should be adopted.³ Sometimes though '[t]he context of the words, the consequences of a literal or grammatical construction, the purpose of the statute or the canons of construction may require the words of a legislative provision to be read in a way that does not correspond with the literal or grammatical meaning.'⁴ A departure from the literal meaning of a provision is to be preferred when the literal construction results in a provision operating in a way that is absurd, irrational or contrary to the intention of the legislation.⁵

9. Recent judicial trends indicate that the formerly accepted rule that a penal provision must be construed strictly has lost much of its importance. There is persuasive judicial authority indicating that a strict construction of penal and taxing legislation should only be adopted as a last resort.⁶ Gibbs J (as he was then) described the modern approach to statutory construction of a penal provision in *Beckwith v. The Queen*:⁷

The rule formerly accepted, that statutes creating offences are to be strictly construed, has lost much of its importance in modern times. In determining the meaning of a penal statute the ordinary rules of construction must be applied, but if the language of the statute remains ambiguous or doubtful the ambiguity or doubt may be resolved in favour of the subject by refusing to extend the category of criminal offences: see *R. v. Adams* (1935) 53 CLR 563, at pp 567-568; Craies on Statute Law, 7th ed. (1971), pp 529-534. The rule is perhaps one of last resort.

10. The approach articulated by Gibbs J has been adopted by the High Court on a number of occasions.⁸ In *Newcastle City Council v. GIO General Limited*⁹ McHugh J held that if there is conflict between the literal meaning of a penal provision and the apparent purpose of the provision, then the 'strict construction rule cannot prevent the words from being given their fair meaning'.¹⁰ So far as possible, a statutory construction should be adopted which promotes the purpose of the Act.

² *Cooper Brookes (Wollongong) Pty. Limited v. Federal Commissioner of Taxation* 81 ATC 4292 at 4305.

³ *Cooper Brookes (Wollongong) Pty. Limited v. Federal Commissioner of Taxation* 81 ATC 4292 at 4296.

⁴ *Project Blue Sky Inc v. Australian Broadcasting Authority* (1998) 194 CLR 355 at 384.

⁵ *Cooper Brookes (Wollongong) Pty. Limited v. Federal Commissioner of Taxation* 81 ATC 4292 at 4306.

⁶ *R v. Lavender* (2005) 222 CLR 67 at 97.

⁷ (1976) 135 CLR 569.

⁸ See *Barker v. The Queen* (1983) 153 CLR 338 at 356, *Waugh v. Kippen* (1986) 160 CLR 156 at 165 and *Chew v. The Queen* [1992] HCA 18; (1992) 173 CLR 626 at 632.

⁹ [1997] HCA 53; 191 CLR 85.

¹⁰ 191 CLR 85 per McHugh J at 109.

11. In this case, if the words ‘for your shortfall amount, or for part of it,’ are read as limiting the provision’s application to cases where there is a shortfall, it results in the absurdity that paragraph 284-220(1)(e) never has effect, contrary to the provision’s clear intent.¹¹ To avoid this absurdity, it is necessary that those words be read down so as to allow paragraph 284-220(1)(e) to have its intended effect. The Commissioner considers that the words ‘for your shortfall amount, or part of it’ do not have any operation where there is no shortfall amount. They are not to be read as limiting the provision’s application only to cases where there is a shortfall amount. Therefore, when applying subsection 284-220(1) to a paragraph 284-220(1)(e) situation (where there is no shortfall amount), they are to be disregarded.

12. This way of construing section 284-220 reflects the approach favoured by courts where there is a textual mistake and the literal construction results in a provision operating in a way that is absurd, irrational or contrary to the purpose of the legislation. In cases of this kind the courts have favoured an approach which has given the provision ‘a strained construction’ to achieve that purpose, provided that the construction is neither unreasonable nor unnatural: see *Newcastle City Council v. GIO General Ltd* (1997) 191 CLR 85 at 113 per McHugh J and *James Hardie & Coy Pty Ltd v. Seltsam Pty Ltd* (1998) 159 ALR 268 at 288 per Kirby J.

13. The Commissioner considers that the provision was clearly intended to increase a taxpayer’s base penalty amount by 20% if the taxpayer had, in a previous accounting period, been penalised for having failed to give a return, notice or other document in which a statement can be made about a tax-related matter. There was an oversight in failing to advert to the fact that not all taxpayers intended to be covered by the provision will have a shortfall amount, and the consequence of that omission is that the provision would, if read strictly, not apply in all the circumstances in which it was clearly intended to apply. The Commissioner considers that if Parliament’s attention had been drawn to the defect, it could reasonably be concluded that the additional words would have been used to make its intent clear. Therefore, where subsection 284-75(3) applies, the base penalty amount should be increased by 20% where the same penalty was imposed in a previous accounting period.

¹¹ Paragraphs 1.114 and 1.121 of the Explanatory Memorandum to the A New Tax System (Tax Administration) Bill (No. 2) 2000.

Appendix 2 – Your comments

14. We invite you to comment on this draft Taxation Determination. Please forward your comments to the contact officer by the due date. (Note: the Tax Office prepares a compendium of comments for the consideration of the relevant Rulings Panel. The Tax Office may use a sanitised version (names and identifying information removed) of the compendium in providing its responses to persons providing comments. Please advise if you do not want your comments included in a sanitised compendium.)

Due date: 4 May 2007

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References

Previous draft:

Not previously issued as a draft

Related Rulings/Determinations:

TR 2006/10

Subject references:

- administrative penalty
- failure to lodge

Legislative references:

- TAA 1953 Sch 1 284-75(3)
- TAA 1953 Sch 1 284-80(1)
- TAA 1953 Sch 1 284-90(1)
- TAA 1953 Sch 1 284-220
- TAA 1953 Sch 1 284-220(1)
- TAA 1953 Sch 1 284-220(1)(a)
- TAA 1953 Sch 1 284-220(1)(b)
- TAA 1953 Sch 1 284-220(1)(c)
- TAA 1953 Sch 1 284-220(1)(d)
- TAA 1953 Sch 1 284-220(1)(e)
- TAA 1953 Sch 1 284-225
- TAA 1953 Sch 1 298-30

Case references:

- Barker v. The Queen (1983) 153 CLR 338
- Beckwith v. The Queen (1976) 135 CLR 569
- Chew v. The Queen [1992] HCA 18; (1992) 173 CLR 626
- Cooper Brookes (Wollongong) Pty. Limited v. Federal Commissioner of Taxation 81 ATC 4292
- James Hardy and Coy Pty Ltd v. Seltam Pty Ltd (1998) 159 ALR 268
- Newcastle City Council v. GIO General Limited [1997] HCA 53; 191 CLR 85
- Project Blue Sky Inc v. Australian Broadcasting Authority (1998) 194 CLR 355
- R v. Adams (1935) 53 CLR 563
- R v. Lavender (2005) 222 CLR 67
- Waugh v. Kippen (1986) 160 CLR 156

Other references:

- Explanatory Memorandum to the A New Tax System (Tax Administration) Bill (No. 2) 2000

ATO references

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