IT 2012 - Remission under section 226(3) of additional tax imposed by section 226(2) of the Income Tax Assessment Act 1936

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TAXATION RULING NO. IT 2012

REMISSION UNDER SECTION 226(3) OF ADDITIONAL TAX IMPOSED BY SECTION 226(2) OF THE INCOME TAX ASSESSMENT ACT 1936

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I 1070243	ADDITIONAL (PENALTY) TAX: REMISSION OF	226 (2)
	REMISSION OF ADDITIONAL (PENALTY) TAX	226 (3)

PREAMBLE This ruling provides new guidelines for the exercise of the Commissioner's discretion under section 226(3) to remit the statutory penalty imposed by section 226(2). These guidelines replace those included in the Head Office memorandum of 11 May 1961 (the 1961 guidelines) and other directions relating to the remission of section 226(2) penalties, e.g. those concerning appropriate penalties for omissions of dividend/interest income and overclaims for the spouse rebate. To the extent that earlier rulings or principles are intended to be retained these have been incorporated in this ruling.

2. It is appropriate to remember that it is section 226(2) which imposes the penalty and the provision automatically comes into effect as soon as the conditions for its operation exist, i.e. there has been an understatement of taxable income etc. The extent of the penalty, i.e. double the tax avoided, is an indication of the seriousness with which the Parliament regards evasion. What authorising officers are doing, of course, in determining a rate is remitting a penalty, in whole or in part, that has already been imposed and they remit only for reasons considered as sufficient. The new guidelines give an indication as to the reasons that might be regarded as "sufficient" for the purposes of section 226(3).

3. The purpose of the heavy penalties imposed by section 226(2) is to ensure the accuracy of returns on which the income tax system is based. It is clear from the wording of that provision that those penalties are not intended to be applied only in cases of fraud or other deliberate evasion but also where the evasion is a result of factors such as carelessness, ignorance of the law, etc. The policy relating to the remission of additional tax has been framed accordingly.

4. The guidelines are to take effect in respect of assessment

forms prepared from 14 February 1983 and are to be applied to all adjustments penalisable under section 226(2), whether the return has been assessed or not, except, of course, adjustments in respect of which prosecution action is taken.

5. To enable the extent of penalty remission to be determined by supervisors, officers are required to comment specifically and separately in their reports or penalty submissions on the extent to which the aggravating factors listed in the guidelines exist. Where it is considered that further remission of the penalty in terms of Note 10 may be warranted, the relevant circumstances of the taxpayer should be fully documented. In determining the extent of penalty remission approving officers exercising the Commissioner's discretion should clearly state the reasons for their decision. This action will be necessary for the proper investigation of complaints regarding penalties by, or on behalf of, taxpayers and for Head Office monitoring purposes.

6. Penalty determined in one area of the office is not to be reduced in another area without prior reference to a senior officer with responsibility in both areas, e.g. the First Assistant Deputy Commissioner in Sydney and Melbourne and the Assistant Deputy Commissioner in other branch offices. Reference to a senior officer will not be necessary where officers of similar classification from the two areas involved are able to reach agreement regarding remission of penalty. Such agreement should however, be in accordance with the guidelines.

RULING

7. This ruling consists of -

(a) guidelines in the form of a broad outline of the approach which ought generally to be adopted in the exercise of the discretion under section 226(3) (paragraph 8) and explanatory notes regarding particular aspects of that approach (paragraphs 9-30); and

(b) comment regarding the application of section 226(2) and the guidelines to some particular kinds of adjustments where there may be a degree of difficulty in determining the appropriate penalty or whether there should be any penalty at all.

Guidelines for Remission of Section 226(2) Additional Tax

8. The discretion under section 226(3) should be exercised so as to reduce the penalty imposed by section 226(2) in accordance with the following guidelines.

Voluntary Disclosures - 10% per annum, subject to a maximum in any year of 50%, of the tax avoided (Note 1).

Non-voluntary Cases, i.e. all other adjustment to which section 226(2) applies (Note 2) -

- a basic penalty of -

- 10% per annum of the tax avoided for the period up to and including 13 February 1983 and 20% per annum thereafter (see Note 3), plus

- 40% of the tax avoided

subject to increase by a further percentage of the tax avoided (as indicated below), depending on the seriousness of the offence, for each of the following circumstances that exists (Note 4).

(a) Deliberate steps have been taken, either before or after commencement of official enquiries, to conceal omitted income or support a false claim (Note 5) - 10% to 50%.

(b) The above steps have involved corruption of employees or collusion (Note 6) - 10% to 50%.

(c) There has been previous tax evasion by or on behalf of the taxpayer (Note 7) - 10% to 50%.

(d) The degree of co-operation has been less than "reasonable" or such as to cause excessive delay in the completion of the official enquiries, and/or there has been positive obstruction (Note 8) - 10% to 50%.

(e) There is other tax evasion, not subject to additional tax under section 226(2), by or on behalf of the taxpayer (Note 9) - 10% to 50%.

The basic rate of penalty (10% or 20% per annum plus 40% flat), subject to increase as indicated above, is to be applied to all items penalisable under section 226(2) except in certain limited situations where the statutory penalty may be further reduced (Note 10). Care should, of course, be exercised to ensure that the penalty calculated in accordance with the above guidelines does not exceed the statutory maximum of 200% of the tax avoided.

Note 1

9. To qualify for this concessional treatment the voluntary disclosure must -

(i) be a full and true one including all material facts; and

(ii) not be due, directly or indirectly, to departmental activities in connection with the affairs of the taxpayer concerned under any of the Acts administered by the Commissioner.

10. Under (i) a disclosure must be reasonably complete in order to warrant the concessional treatment. Where the degree of incompleteness is insignificant, the whole of the tax avoided may be treated as covered by the voluntary disclosure. Where, however, a taxpayer voluntarily discloses an omission of income or

an incorrect claim and subsequent enquiries reveal a further, significant understatement or incorrect claim which he may reasonably be suspected to have known about at the time he made his partial disclosure, the concessional treatment should be denied. Similarly, the disclosure of the ownership of assets for other purposes will not usually amount to a voluntary disclosure, for income tax purposes, of omitted income derived from those assets.

11. In relation to (ii), disclosures are sometimes claimed to be voluntary when, in fact, they are prompted by departmental action which has already been initiated and which may have indicated to the taxpayer that his affairs are being investigated. Such action may comprise indirect enquiries (e.g. at the taxpayer's bank), direct enquiries of the taxpayer such as an initial interview prior to investigation or a request for a statement of assets and liabilities, or an investigation of his liability to other taxes. For instance, omitted income may be disclosed by a taxpayer consequent upon his investigation for the purpose of sales tax or in connection with tax instalments deducted from salary or wages of employees under the PAYE system. Such disclosures should not be treated as voluntary. The mere listing of a taxpayer's name for future investigation does not, however, preclude the possibility of a voluntary disclosure on his part.

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

13. As the penalty will only run from the due date for payment of the relevant assessment (issue date of notice in refund and non-taxable cases) there will be no penalty under section 226(2) for voluntary disclosures relating to unassessed returns.

Note 2

14. 'Non-voluntary cases' will include understatements of taxable income, whether from omissions of assessable income or overclaims for deductions, and overclaims for rebates that are penalisable.

15. It is considered that, unless there are extenuating circumstances of the kind referred to in Note 10 justifying a reduced penalty, the basic rate of penalty (subject to increase as indicated on page 1) should apply to all understatements of taxable income and overclaims for rebates falling within section 226(2), including those claimed to be the result of carelessness, or ignorance as to liability to tax, or the fault of an agent. (In the case of tax agent negligence the taxpayer has section 251M or other legal remedies to fall back on).

16. With regard to overclaimed deductions, it is considered that

section 226(2) applies not only to overclaims where an amount claimed as a deduction has not been incurred at all but also to claims for excessive deductions in respect of expenditure which is misdescribed in a return in such a way as to be misleading whether the misdescription is deliberate or not. Examples of the latter kind of case include the claiming of items of capital as repairs or investment allowance claims relating to ineligible plant where the plant, or the relevant circumstances surrounding its purchase, is incorrectly described. The basis of this policy is the belief that the penalisable offence created by section 226(2) is a claim to deduct an amount in excess of that actually expended or incurred for the purpose described in the claim. The sub-section should therefore be read as if the words underlined above followed the words "actually incurred by him" in the sub-section. Of course, no additional tax should be imposed where the deductibility of a claim (or the assessability of an amount) is clearly arguable and the description of the claim (or amount regarded as assessable) is reasonably accurate. Such a case would not be one to which the sub-section applies.

Note 3

17. In exercising the discretion to remit the statutory penalty to one that is appropriate in the circumstances, regard should be had to two main factors. The first to be taken into account is the length of time a taxpayer has had the use of money properly payable to the revenue. Regard is best had to this factor by having the overall penalty include a per annum component. It is considered appropriate to equate this component with the percentage rate applicable to late payment to tax pursuant to section 207, but to achieve prospective application the 20% rate will only apply to that part of the period subject to penalty commencing on 14 February 1983.

18. The second main factor to be taken into account in arriving at an appropriate penalty should be unaffected by the first and should reflect more the degree of seriousness of the offence, or culpability, and to a lesser extent the degree of co-operation with departmental enquiries.

19. Therefore, in determining penalties in the future each of these components is to be regarded separately. The per annum calculation should be based on the period from the due date for payment of the relevant assessment (issue date of notice in refund and non-taxable cases) to the date of preparation of the amended assessment form (original assessment form in cases which were previously non-taxable). The 10% per annum rate will apply to the period from the former date to 13 February 1983 and the 20% rate to the period from 14 February 1983 to the date of preparation of the relevant assessment form. With the exception of previously assessed non-taxable cases, the per annum component will not apply in original assessments which are, however, still subject to the flat rate penalty component.

Note 4

20. It is desirable that, where there are aggravating factors

which significantly add to the seriousness of the offence, officers exercising the discretion under section 226(3) not only take these factors into account but do so in the uniform and consistent fashion. Subjecting the basic penalty to increase, within set parameters, by having regard to such factors should go a long way toward achieving this. Having a range of additional penalty (rather than a set percentage) allows due regard to be given to the degree of culpability and co-operation.

Note 5

21. An additional percentage of the tax avoided should be added to the basic penalty where deliberate steps have been taken to conceal the evasion. Instances would be accounts or other assets under a false name, falsified invoices, altered cheque butts and the like, or where the taxpayer works under a false name, by means of which omitted income has been concealed or claims for false deductions or rebates supported. Although these acts will be of varying degrees of seriousness, it is considered that by far the greater part of offences will fall within the 10%-25% range with the higher end of the range being reserved for extreme cases of fraud. Examples of cases falling within the lower half of the scale would be the falsification of several documents to support a false claim or the omission of income of, say, $200 from a single building society account in a false name. Of these the former may be the more serious in which case it should attract a slightly higher rate of penalty. As all the circumstances of a particular case need to be taken into account in determining the seriousness of an offence it is not practicable to illustrate the particular percentage of penalty different situations would attract.

Note 6

22. The basic penalty should also be increased where the taxpayer involves employees in deliberate steps to conceal income or support a false claim and those employees are aware that they are being so used. It should be increased also where, in taking those steps, the taxpayer conspires or there is collusion between him and another person. An example of circumstances warranting additional penalty under this heading would be a case where a taxpayer makes a false claim based on falsified invoices and enquiries reveal that he directed an employee to alter documents. If he later counselled the employee to deny to officers conducting enquiries that he had altered the documents he would be even further compounding the offence. Again, as in the previous category, it is envisaged that almost all cases would fall within the lower half of the penalty scale provided, the upper half being for the rare, very extreme case. (This situation would, of course, also attract additional penalty in accordance with Note 5).

Note 7

23. Further penalty should also be applied where previous tax evasion, or participation in a tax avoidance scheme which has been subject to section 226(2) penalty, has occurred. Where the former applies the rate of additional tax will depend on whether the evasion was considered deliberate or not and the extent and number

of previous offences. For example, a situation where substantial omissions, considered deliberate, are established and the taxpayer has been the subject of two previous investigations within the past 10 years, substantial understatements having been found in all years examined, would obviously attract a penalty in the upper end of the 10%-50% range. A Husband/Wife Check case detected and penalised for the second time would also warrant additional penalty under this heading but possibly in the middle range of this category.

Note 8

24. The basic penalty assumes a reasonable degree of co-operation with official enquiries. The broad range of additional penalty proposed here allows for, at the far end of the scale, an additional penalty of 50% in a case of positive obstruction and, at the lower end, an additional penalty of 10% where the degree of co-operation has been less than reasonable but has not amounted to total non-co-operation. For example, a taxpayer who omits interest income from his return and fails to respond to our enquiries (both written and oral) until issued with a formal notice under section 264 which he complies with should probably not be further penalised in this regard by more than 10% of the tax avoided. Additional penalty of a significantly greater percentage would, however, apply to a situation where the taxpayer's behaviour in an investigation of his affairs borders on obstruction and enquiries are excessively delayed as a result.

Note 9

25. When deciding a taxpayer's degree of culpability regard should also be had to the extent to which the taxpayer has understatements of taxable income additional to those to which section 226(2) applies. Accordingly, a further percentage of penalty should be added where tax evasion involving non-penalisable items has occurred. The rate of this additional penalty will depend on the extent of the evasion and whether it is considered deliberate or not. It is envisaged that, as non-penalisable adjustments usually constitute only a small proportion of overall understatements, the majority of cases would fall within the lower half of the penalty scale provided.

Note 10

26. The purpose of this note is to give an indication of the kind of case where the statutory penalty may be remitted beyond what these guidelines refer to as the basic penalty, or the basic rate of penalty. As is indicated in Note 2, penalties should not be reduced beyond the basic rate merely because the taxpayer claims the understatement or overclaim was the result of carelessness, or ignorance as to liability to tax, or the fault of his agent. For the statutory penalty to apply, an intent to evade tax is not required. As Evatt J said in FCT v Trautwein (No 3) 56 CLR 211 at p. 217 : "The object of the section is to impose a heavy penalty so as to ensure the accuracy of returns, upon which the whole income tax system of the Commonwealth is based."

27. It is acknowledged, however, that from time to time there will be cases where the appropriate circumstances warrant further remission of the section 226(2) penalty. These cases should be seen as limited and exceptional. It is not possible to specify all those situations where it is considered further remission is warranted but in broad terms they will be situations where, more often than not because of a combination of circumstances rather than a single circumstance, the taxpayer's offence is considered either wholly or substantially excusable. Thus, while no one factor such as carelessness, ignorance, serious ill health or advanced age would normally warrant further remission, the presence of two or more of such factors might well amount to extenuating circumstances warranting a reduction in penalty.

28. In listing a number of circumstances regarded as sufficient to warrant further remission of penalty it is pointed out that the list is not intended to be exhaustive but only an indication of the kind of circumstances warranting further reduction of the penalty. At the same time, it is emphasised that the kinds of cases indicated are intended to be exceptional and limited. A broad brush approach should not be taken.

29. Subject to these comments, circumstances of the kind warranting further remission would include cases where you are satisfied that -

(i) the taxpayer's offence was occasioned by carelessness of a less serious nature and there are other mitigating factors, e.g. advanced age or serious illness, which excuse that carelessness to a substantial extent;

(ii) the taxpayer's offence was occasioned by ignorance of the law in the sense that, in the particular exceptional circumstances, he could not reasonably be expected to have been aware of the requirements in question;

(iii) the taxpayer has made a genuine and, in the particular exceptional circumstances, excusable mistake in interpreting the law. (Both this and the preceding kind of case could probably only occur where the return was not prepared by an agent);

(iv) the office adjustment is clearly contentious. This does not mean that there should be a further remission of penalty merely because the precise quantum of the adjustment cannot be proved. A lower penalty should be considered only where the quantum or legality of the adjustment is open to serious and genuine dispute; or

(v) the effect of the penalty, having regard to the taxpayer's net assets and his potential earning capacity, would be such as to amount to a 'ruinous imposition', i.e. leave the taxpayer with little or no remaining assets.

30. In cases such as these the circumstances will have been considered sufficiently exceptional to warrant a further reduction in the penalty on the grounds that the taxpayer's offence was either substantially or wholly excusable. In the former case, i.e. where the offence is considered substantially, but not wholly, excusable, a reduction in what might be called the culpability component of the penalty to, say, 15% might be appropriate. In the latter case, where the circumstances are so exceptional that the taxpayer's offence is considered to be wholly excusable, the whole of the culpability component of the penalty may be remitted. Any remission of the per annum component of the penalty should be allowed in only the most exceptional of cases.

APPLICATION OF SECTION 226(2) AND THE GUIDELINES TO SOME PARTICULAR KINDS OF ADJUSTMENTS

31. With some particular kinds of adjustments, e.g. those concerning claims for repairs or investment allowance or amounts to be assessed as profits under section 26(a) or valuation of stock on hand, there may be a degree of difficulty in determining the appropriate penalty or whether there should be any penalty at all. The purpose of the following paragraphs is to provide assistance in deciding whether section 226(2) applies, and if it does, in applying the guidelines to adjustments of this kind.

32. Before the guidelines can come into play it is, of course, necessary to decide whether the particular adjustment is one to which section 226(2) applies, that is whether it is penalisable or not. In some cases a decision on this point resolves the difficulty of the case. If the decision is that the sub-section does not apply then, of course, the adjustment is not liable to penalty. If, on the other hand, it is decided that the adjustment comes within the sub-section the statutory penalty is automatically imposed and the guidelines, which relate to the exercise of the discretion under section 226(3), apply. The penalty should then be calculated according to the rates laid down, subject, of course, to further remission in accordance with Note 10.

Depreciation, Bad Debts and other Non-Penalisable Items

33. For section 226(2) to apply, a claim for a deduction must have been based on an amount of expenditure in excess of that incurred by the taxpayer in the relevant year. Excessive claims for items such as bad debts, depreciation, loss on sale of depreciable assets and carry-forward losses are not claims for a deduction based on expenditure incurred in the relevant year; section 226(2) is therefore not applicable to them. The section is also not applicable to situations such as those involving an excessive deduction for trading stock in terms of section 28(3).

Section 82AA - Investment Allowance

34. As stated in Note 2 of the guidelines it is considered that section 226(2) should be read as if the words "actually incurred by him" were followed by the words "for the purposes described in

the claim." As far as claims for the investment allowance are concerned, section 82AB specifies certain conditions to be met by the expenditure for an amount to be allowable as a deduction. These conditions are qualifications of the expenditure which must be satisfied for the expenditure to be of the type or description to which section 82AB applies. The view is held therefore that, in considering whether section 226(2) applies to particular investment allowance claims, the relevant words of the sub-section, extended as indicated in the opening sentence of this paragraph, must be taken to refer to expenditure of the type or description, or for the purpose specified, in section 82AB. It follows that on any one of these conditions not being satisfied the expenditure would not be "expenditure actually incurred" for the purposes of section 226(2).

35. Accordingly, on the basis of the above views, section 226(2) should be regarded as applicable to all incorrect claims for the investment allowance where either all the material facts have not been disclosed or some of those facts have been incorrectly stated. Where section 226(2) applies the guidelines apply, including Note 10 which makes allowance for genuinely arguable claims, etc.

Sections 26(a) & 26AAA - Profits from Sale of Property

36. The guidelines are to apply to omissions of assessable income arising from sales of property falling within section 26(a) or section 26AAA. In relation to the latter, the law is quite clear and it is difficult to envisage cases where the circumstances would warrant any further remission of penalty. In view of the requirements of disclosure stated on income tax return forms there is no reason why the guidelines should not apply to section 26(a) cases either where there is no, or very limited, disclosure or where there is disclosure but the facts are incorrectly stated or obscure the correct application of section 26(a) to the transaction. Where the application of section 26(a) is clearly arguable a case may be made out for further remission as discussed in Note 10.

Sections 108 and 109 - Deemed Dividends

37. As private companies and their shareholders are taxed under the Act separately on their respective taxable incomes the application of section 226(2) and the guidelines should also be considered separately in relation to both companies and their shareholders in deemed dividend situations.

38. The first question for decision in each case is whether section 226(2) applies to the particular adjustment being made. Where a payment made by a company is deemed to be a dividend in terms of section 108 or section 109, with the effect that the company is denied a deduction to which it would otherwise have been entitled, and there has not been a disclosure of all material facts, section 226(2) applies and the guidelines should be followed. Insofar as shareholders, directors, etc. are concerned, many of the payments which are the subject of an opinion formed under section 108 or section 109 are, by their very nature,

clearly assessable in the hands of recipients prior to, and apart from, their being deemed dividends. In the case of section 109 type payments it is clear that they would ordinarily be assessable to the taxpayer in terms of section 25(1) or section 26(d). Similarly, there would be payments which, prior to the application of section 108, would be assessable income under other sections of the Act, e.g., sections 25(1), 26(e), 44(1). Accordingly, if the payment which is the subject of section 108 or 109 consideration should, apart from those provisions, have been returned as assessable income in the form of salary/wages, dividends, section 26(d) income, etc. but has not in fact been returned, then the omission is one to which section 226(2) applies with the result that penalty should be imposed in accordance with the guidelines.

39. Where, however, the character of the payment is such that, but for it having been deemed a dividend, it would have been non-assessable (e.g. a loan or advance to a shareholder who was not also an employee of the company) or assessable in part only (e.g. a lump sum retiring allowance) and the amount is deemed a dividend after lodgement of the recipient's return, it is considered that section 226(2) does not apply because it cannot be said that the taxpayer omitted the deemed dividend from his return.

Trading Stock

40. Adjustments to the valuation of trading stock fall within section 226(2) where they amount to understatements of assessable income, that is to the extent that they increase the amount assessable under section 28(2). If the effect of the adjustment is merely to reduce a deduction under section 28(3) the adjustment will not fall within section 226(2) as it constitutes neither an understatement of taxable income nor an overclaim of expenditure incurred.

41. In the past there has been a tendency to remit a greater than usual proportion of the statutory penalty in these cases because of factors such as the argument that the manipulation of trading stock valuations is more a means of deferring tax than evading it, or the fact that the agreement of the taxpayer has been obtained to include the whole of the stock adjustment in the latest year rather than "rolling back" over a number of years. Such factors should no longer be regarded as circumstances warranting further reduction of penalty. Incorrect trading stock valuations, whether manipulated or otherwise, are contrary to the Act and, to the extent that they are understatements of assessable income, subject to the statutory penalty imposed by section 226(2). They are also very prevalent. Consequently, where section 226(2) applies, the guidelines should be applied. As for those cases where we seek the taxpayer's agreement to the whole of the stock adjustment being effected in the latest year, the inclusion of a per annum component in the section 226(2) penalty will now mean that it will generally be to his advantage to agree to this basis of adjustment rather than having the adjustment "rolled back". Again, where section 226(2) applies, the guidelines should also be applied.

42. With regard to those cases where the taxpayer has used the direct cost method of valuing manufactured goods, the direction in

the Head Office memorandum of 22 June 1978 (our reference 77/3720) to refrain from imposing additional tax has been reviewed. While a number of matters of detail have yet to be decided in the Phillip Morris case (79 ATC 4352), the absorption cost basis of valuing stock has clearly been endorsed as the appropriate method by the Supreme Court of Victoria in that case. That decision is now of three years standing and it is considered that sufficient time has elapsed for taxpayers or their accountants to have become aware of the requirement to calculate the cost of manufactured stock on hand on an absorption basis. Accordingly, understatements of income resulting from the incorrect use of the direct cost method are considered to come within section 226(2) and the guidelines should be applied, commencing with 1983 returns.

Income disclosed in another return

43. In cases where the income omitted from a taxpayer's return has either been disclosed in another year or returned by another taxpayer, departure from the guidelines is not considered to be warranted except to the extent of basing the calculation of penalty on the actual tax which has been avoided in overall terms due to the income having been returned elsewhere. In many instances, little or no tax will have been avoided as the same rates of tax would apply to the assessments in question. Where some tax has been avoided as a result of the income being disclosed elsewhere, it is likely that a case for further remission in terms of Note 10 could be made out.

Reserves and provision claimed as deductions

44. It is considered that, as the legal position in relation to the deductibility of provisions and reserves is quite clear, there is no justification at all for departing from the guidelines where claims for items such as provisions for long service leave are encountered.

Repairs

45. The question whether expenditure claimed as repairs can be said, for the purpose of determining the application of section 226(2), to be in excess of that actually incurred for the purpose described in the claim depends largely on the extent to which it is accurately described. If expenditure claimed as repairs is described reasonably accurately in the return, then section 226(2) has no application. Where however, as happens much more often, very little, if any, information is provided in relation to the claim, section 226(2) is considered to apply to any amount subsequently disallowed as a deduction and the penalty applicable should be calculated in accordance with the guidelines. If special circumstances as discussed in Note 10 exist, e.g. the adjustment is clearly contentious, then there is, of course, scope for further remission.

Section 26(e) - Allowances, Gratuities, Benefits, etc.

46. The income tax return forms make it clear that the taxpayer is required to disclose details of any allowances, benefits, etc.,

received in connection with employment or services rendered. Accordingly, where the taxpayer does not disclose any such details and it is subsequently found that he did receive an allowance, benefit, etc, in terms of section 26(e), it is considered that section 226(2) and, consequently, the guidelines, would apply. Section 226(2) and the guidelines would also apply where an amount is returned but falls short of the amount assessable under section 26(e).

47. Section 226(2) would not, of course, apply where the taxpayer discloses the receipt of an allowance or benefit in reasonable detail but claims the value to him to be less than that finally assessed to him.

COMMISSIONER OF TAXATION
25 JANUARY 1983