


IT 2564 - Income tax : remission of additional tax imposed in tax avoidance cases under anti-avoidance provisions or Part IVA.

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TAXATION RULING NO. IT 2564

INCOME TAX : REMISSION OF ADDITIONAL TAX IMPOSED IN TAX
AVOIDANCE CASES UNDER ANTI-AVOIDANCE PROVISIONS OR PART
IVA.

F.O.I. EMBARGO: May be released

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F.O.I. INDEX DETAIL

REFERENCE NO:	SUBJECT REFS:	LEGISLAT. REFS:
I 1011633	REMISSION OF ADDITIONAL PENALTY TAX	224 226 227(3)

OTHER RULINGS ON TOPIC: IT 2121, IT 2517

PREAMBLE This Ruling provides guidelines for the exercise of the Commissioner's discretion under subsection 227(3) to remit the additional tax imposed by sections 224 and 226. It replaces Taxation Ruling No. IT 2312.

2. The guidelines take into account changes to the law following the enactment of the Taxation Laws Amendment Act 1984 which, inter alia, applies to schemes covered by sections 224 and 226 entered into on or after 14 December 1984.

3. Section 224 is concerned with schemes where the Commissioner applies an anti-avoidance provision of the Act (other than Division 13 or Part IVA) that involves or is dependent on the forming of an opinion, the attaining of a state of mind, the making of a determination or the exercise of a power by the Commissioner and the scheme is entered into or carried out for the sole or dominant purpose of enabling a person to pay no tax or less tax. "Scheme" has the same meaning as it has in Part IVA of the Act.

4. Section 224 imposes additional tax by way of penalty equal to double the difference between the tax properly payable and the tax that would have been payable had the scheme been successful. A general power of remission is exercisable by the Commissioner under subsection 227(3).

5. Section 226 is specifically concerned with Part IVA schemes entered into on or after 14 December 1984. Part IVA schemes entered into prior to that date were subject to the similar penalty provisions that were previously contained in the former subsection 226(2A). Only schemes that are entered into or carried out for the sole or dominant purpose of enabling a taxpayer to pay no tax or less tax are within the scope of Part IVA.

6. Section 226 provides for the imposition of additional tax by way of penalty equal to double the difference between the tax properly payable - after cancellation under subsection 177F(1) of a tax benefit - and the tax that would have been payable had the scheme been successful. Again, a general power of remission is exercisable by the Commissioner under subsection 227(3).

7. In providing guidelines, there is no intention of laying down any conditions to restrict Deputy Commissioners and authorised officers in the exercise of the discretion to remit additional tax. It is essential that Deputy Commissioners and authorised officers retain the flexibility necessary to deal with each particular case on its merits. What is being attempted in this Ruling is to set out for the information of officers a guide as to the manner in which the discretion might generally be exercised.

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

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9. It is clear from the enactment of sections 224 and 226 that involvement in a tax avoidance scheme for which there is specific anti-avoidance legislation is regarded as a most serious matter. Accordingly taxpayers who enter into such schemes may incur high penalties for doing so. Unlike section 223, the avoidance scheme penalties do not require any false or misleading statement for their application. Participation in a tax avoidance scheme, per se, attracts the operation of the provisions. In tax avoidance cases covered by sections 224 and 226, where there is reasonable co-operation with official enquiries, the statutory penalty imposed by either section should be remitted to a "per annum" component plus a "culpability" component of 45% of the tax avoided. (For the purposes of this Ruling the terms "per annum" component and "culpability" component are to have the same meaning as those terms have in Taxation Ruling No. IT 2517 : see paragraph 32 of IT 2517.)

10. The "per annum" component in section 224 and 226 cases should be based on the period from the due date for payment of the relevant assessment (30 days after the issue date in a refund or non-taxable case) to the date when the position is reached where a correct assessment is able to be made. However, in this calculation the taxpayer should not be penalised for delays occasioned by the ATO. Where a prepayment of tax in relation to the anticipated application of the anti-avoidance

provisions is made after the assessment but before the amended assessment applying the anti-avoidance provision, the "per annum" component should be applied to the period measured from the due date for payment of the assessment (30 days after the issue date in a refund or non-taxable case) until the date on which the payment was made.

11. Subject to the total penalty (the "per annum" component plus the "culpability" component) not exceeding the statutory 200% of the tax avoided, there are circumstances (some of which are listed below) where an increase in the "culpability" component calculated in accordance with the previous paragraphs would be warranted. Depending on the particular circumstances, the culpability component may warrant an increase of 5 - 50 per cent of the tax sought to be avoided where any or each of the following circumstances exist:

- (a) deliberate steps have been taken, either before or after commencement of official enquiries, to conceal the avoidance of tax;
- (b) there has been a lack of reasonable co-operation which has caused undue/excessive delay in the completion of official enquiries, and/or there has been obstruction or hindrance. The taxpayer under review is expected not only to assist by the provision of all relevant information in its possession but also to do all in its power to facilitate the obtaining of information from its associated entities;
- (c) there has been previous participation in tax avoidance or evasion practices by or on behalf of the taxpayer;
- (d) the taxpayer has promoted, advised or encouraged others in the practice of tax avoidance or tax evasion.

12. On the other hand, the basic penalty may be reduced where mitigating factors exist. For example, where there is a full complete and voluntary disclosure of all the material facts at the time of lodging all the relevant income tax returns, some further remission may be warranted depending on the nature, extent and timing of the disclosure and if the matter is clearly contentious. However, having regard to the general legislative intent, it is considered the penalty generally should not be remitted to below a flat rate of 10 percent plus the "per annum" component unless there are very exceptional circumstances.

13. In the past, public statements on behalf of the ATO have indicated a complete remission of penalty in Part IVA cases if there is a full and true disclosure of all the arrangements in the returns of income of all the relevant entities. To the extent this Ruling provides that the statutory penalty should not be remitted below a "culpability" component of 10% of the tax avoided plus the "per annum" component in cases where Part IVA is applied, these statements are now overruled. However, this guideline is to be followed in respect of cases where there is a full and true disclosure, as described above, only if the

return of the taxpayer concerned is lodged after 7 August, 1986
(the date of effect of former Taxation Ruling No. IT 2312).

COMMISSIONER OF TAXATION
26 October 1989