IT 2624 - Income tax: company self assessment; elections and other notifications; additional (penalty) tax; false or misleading statement

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This ruling contains references to repealed provisions, some of which may have been rewritten. The ruling still has effect. Paragraph 32 in TR 2006/10 provides further guidance on the status and binding effect of public rulings where the law has been repealed or repealed and rewritten. The legislative references at the end of the ruling indicate the repealed provisions and, where applicable, the rewritten provisions.

TAXATION RULING NO. IT 2624

INCOME TAX: COMPANY SELF ASSESSMENT; ELECTIONS AND OTHER NOTIFICATIONS; ADDITIONAL (PENALTY) TAX; FALSE OR MISLEADING STATEMENT

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Reference no.:	Subject refs:	Legislative refs:
I 1012496	COMPANY SELF ASSESSMENT ADDITIONAL (PENALTY) TAX ELECTIONS AND OTHER NOTIFICATIONS	161, 169A, 222, 223, 262A, Reg. 17

OTHER RULINGS ON THIS TOPIC: IT 2141, IT 2517, IT 2593, IT 2616

PREAMBLE As a result of the introduction of full self assessment procedures, companies and funds (that is, superannuation funds, approved deposit funds and pooled superannuation trusts) are required to provide less information in their income tax returns than previously.

2. The legislation for the new system was contained in Taxation Laws Amendment Act (No. 5) 1989 and associated amendments were made to the income tax regulations. The changes apply to tax returns and payments in respect of income derived in the 1989-90 and later income years or relevant substituted accounting periods.

3. The simplified return form now used by companies and funds is authorised by regulation 17 (formerly regulation 11). Section 161 of the Income Tax Assessment Act 1936 (the Act) now requires a company or fund to give only limited information in accordance with the return form. Other significant changes were made to s.222 and s.223 and a new s.262A was introduced.

4. Sub-section 222(1A) imposes a liability to pay additional tax where a company or fund fails to keep a record containing particulars of the basis of the calculation of its taxable income and tax payable, or refuses to provide, when and as required by the Commissioner, a document containing those details. Similarly, s.262A obliges a person carrying on a business to keep records that record and explain all transactions and other acts engaged in by the taxpayer that are relevant for any purpose of the Act. Documents containing particulars of any election, estimate, determination or calculation are now generally required to be kept by taxpayers for a five year period.

5. The Treasurer's Explanatory Memorandum states that the purpose of s.222(1A) and s.262A(2) is to make it clear that all records of the type previously included in a return but no longer required to be included under self assessment are to be retained by the taxpayer for the purpose of examination by the Commissioner, if and when requested by the Commissioner for the purposes of the Act.

6. Section 223 imposes a penalty where a false or misleading statement is made. Changes have also been made to s.223(8) and (9) to include within the reference to a statement for the purposes of s.223, a statement made in a document '... prepared ... or purporting to be prepared ... under or pursuant to this Act or the regulations.' The purpose of the changes is to ensure that documents that are brought into existence under self assessment are within the scope of s.223, whether or not they are sent to the Commissioner.

7. Nevertheless some concern has been expressed about the application to the self assessment system of the current penalty regime, and those areas of the law which require or permit taxpayers to lodge elections and other notifications.

8. One concern relates to the possible imposition of penalty under s.223 where there would not have been a false or misleading statement in terms of Taxation Ruling IT 2141 if full disclosure could have been made in the return by the inclusion of material retained by the taxpayer. Similarly, where there would have been a false or misleading statement if such material had been supplied in the return, clarification has been sought as to whether the penalty remission guidelines contained in Taxation Ruling IT 2517 are applicable.

9. The specific concern about elections and other notifications is whether the taxpayer is fully protected against any possible disallowance of the particular operation of the law, as claimed by the taxpayer, or against penalty for failure to notify, on the ground that an election or other notification has not been received in time.

10. This Ruling has two functions:

(a) it provides guidelines for use in applying the 'false or misleading statement' concept in s.223(1)to companies and funds; and
(b) it sets down the approach being taken by the Taxation Office to the application to companies and funds of the provisions of the law which require taxpayers to make elections or give other notifications as a condition of a particular operation of the law.

RULING

11. In short, this Ruling confirms that Taxation Rulings IT 2141 and IT 2517 apply to companies and funds in a manner consistent with the rights and responsibilities of taxpayers applicable prior to self assessment, as long as taxpayers keep and provide to the Taxation Office on request the type of records which they

would have previously lodged with their returns. It also extends the time for making most elections or other notifications until the Commissioner specifically asks for them.

Penalties

12. The reference in s.223(1) to 'a statement ... that is false or misleading in a material particular' has hitherto potentially applied to each item of assessable income included in (or excluded from) a return and to each claim for entitlement to an allowable deduction, rebate or credit (see IT 2141 and paragraph 4 of IT 2517). It has also applied to any explanation of those items and claims included in the return. However, IT 2141 makes it clear that information that is adequate to lead a reasonably prudent and competent taxation officer to disallow the whole or part of a deduction claimed in a return is not to be taken as misleading (paragraph 13 of IT 2141). It also indicates as a general rule that in the case of a statement, the substance of which is clearly arguable as a matter of law, no penalty would be imposed even though the statement may be found, again as a matter of law, to have been inaccurate (paragraph 19 of IT 2141). That is, in considering whether a particular item or claim constitutes a false or misleading statement all the underlying factors are required to be taken into account. Paragraph 22 of IT 2141, which refers to the omission of assessable income, should also be read in this light.

13. Taxation Ruling IT 2141 was drafted prior to the introduction of self assessment and the changes outlined in paragraph 3 above. In the circumstances now prevailing, where a company or fund is not required to specify and explain in its return particular items of income and particular claims, it is not possible to determine whether a statement is false or misleading without reference to documents of the type which would have previously been lodged with the return, including documents containing particulars of any election, estimate, determination or calculation, and particulars thereof. These documents, which should exist at the time the return is lodged, are required to be retained and made available by the taxpayer should they be required in the course of an audit.

14. As outlined in the preamble, the changes to the Act and regulations associated with self assessment reveal a legislative scheme under which taxpayers are required to include only a limited amount of information in the return form; with other information of the type that would previously have been included in the return being retained by the relevant entities. The changes to s.223(8) and (9) mean that both the return form and the information kept by the taxpayer and provided on request in accordance with s.222(1A) are to be read together in determining whether there has been a false or misleading statement for the purposes of s.223.

15. Accordingly, the guidelines in Rulings IT 2141 and IT 2517, as explained in this Ruling, remain relevant for companies and funds and will be applied on the following basis:

(a) the specifying of the amount of taxable income and of the tax payable in a return is to be taken as a series of statements to the effect that the items included in (or excluded from) assessable income and the claims for allowable deductions that make up the taxable income are properly included (or excluded) and deductible respectively, and that any rebates or credits affecting the amount of tax payable are properly allowable; and

(b) whether any of those statements are false or or misleading will be determined by reference to records (including explanatory documents) that:

(i) existed at the time the return was lodged; and

(ii) are retained by the taxpayer or its agent and made available to the Taxation Office on request (e.g., at the commencement of an audit or other relevant enquiry).

Such records would ordinarily have been kept in order to not offend against s.222(1A).

16. Where an issue is contentious (as explained in paragraph 19 of IT 2517) and there is or was, at the time the return was lodged, genuine uncertainty about the application of the law (paragraph 19 of IT 2593) a taxpayer who retains and provides to the Taxation Office on request an explanation of its taxation position, would be treated in the same way as if the relevant disclosure had been made in the return. Where in the light of the information provided on request there is no false or misleading statement, the taxpayer would be subject to interest only under s.170AA, as would previously have been the case. Of course, interest penalty would be remitted in accordance with Taxation Ruling IT 2593.

17. On the other hand, where a false or misleading statement has been made, e.g., where the records retained were either inadequate (in terms of paragraph 13 of IT 2141), or not provided on request, the penalty imposed by s.223 would be remitted on the basis of the guidelines contained in IT 2517.

18. In summary, the legislative scheme requires the question of whether or not a false or misleading statement has been made in a return to be answered by reference to the return and records retained by the taxpayer and made available on request. Taxation Rulings IT 2141 and IT 2517 should be read in this light. Where a company or fund is uncertain about a question which affects its taxation liability for a particular year, the opportunity is provided by s.169A(2), s.160AIB(2) and s.160AQKB(2) to seek the Commissioner's views: refer to IT 2593 and IT 2616.

Elections and other notifications

19. There are many provisions in the Act which require or permit taxpayers to lodge elections or other notifications with the

Commissioner on or before the last day for the furnishing of the return. All but a few (those referred to in paragraph 24 below) authorise an extension of time to be allowed by the Commissioner. For example, frequently used provisions such as s.31(3) (value of trading stock), s.59(2A) (depreciation balancing charge), and s.80G(6)(c) (transfer of loss within company group) all contain the words 'or within such further time as the Commissioner allows.'

20. Consistent with the self assessment system, in every situation where the law authorises the Commissioner to extend the time for making a written election or other notification, the time for lodgment is to be taken as extended for companies and funds until such time as the Commissioner requires the election or notification to be made. Exceptions to this are the specific elections or other notifications that are embodied in the return form for funds.

21. This means that nearly all elections and other notifications should not be lodged with the Commissioner by companies and funds until requested.

22. However, documents containing particulars of any election or other notification that record or explain the calculation of taxable income as disclosed in the taxpayer's return must be kept with other taxation records and made available when requested by the Commissioner.

23. Where the time for notifying the Commissioner has been extended, by force of this Ruling, the fact that notification has not been received by the Commissioner by the date the assessment is deemed to be made, is not a point that could be taken by the Commissioner in any subsequent dispute over the taxpayer's entitlement to a particular operation of the law. Nor could the non-lodgment of such materials justify the imposition of penalty under s.222 or s.223, where particulars were kept by the taxpayer and provided to the Commissioner on request in accordance with s.222(1A).

24. As mentioned, there are a small number of election and notification provisions that do not authorise the Commissioner to extend the time for lodgment or giving notice. Those elections and notifications will have to be lodged within the time specified in the law, generally by the date of lodgment of the return. The provisions in question are:

- Section 52 - loss on property acquired for profitmaking this does not apply to property acquired on or after 20 September 1985;

- Section 124ZADA (Division 10BA - Australian films) - a declaration under s.124ZADA(1) or (5) may be made under an extension of time, but no extension is permitted for a subsequent notification under s.124ZADA(3), which can be given only after the declaration is made. Accordingly, this Ruling does not extend generally the time for making a declaration under s.124ZADA(1) or (5);

- Section 124ZAE - election that Division 10BA is not to apply; and

- Section 297B - pooled superannuation trusts exemption for current pension liabilities.

25. Companies and funds are, of course, required to notify the Taxation Office if they elect to make a single payment of tax in accordance with s.221AU(1). This election would normally be lodged separately from the return.

COMMISSIONER OF TAXATION
10 December 1990