

***Commissioner of Taxation v Bogiatto -***

# Decision impact statement

## Commissioner of Taxation v Bogiatto

<b>Court citation(s):</b>	[2020] FCA 1139
<b>Venue:</b>	Federal Court of Australia
<b>Venue reference no:</b>	NSD 1839 of 2018
<b>Judge name:</b>	Thawley J
<b>Judgment date:</b>	7 August 2020
<b>Appeals on foot:</b>	No
<b>Decision outcome:</b>	Partly favourable to the Commissioner

### Impacted advice



The ATO is reviewing the impact of this decision on related advice and guidance products.

### Précis

This Decision impact statement outlines the ATO's response to this case where the Federal Court found that persons/entities had engaged in conduct that resulted in them and others being promoters of tax exploitation schemes.

### Brief summary of facts

Mr Bogiatto was a chartered accountant who promoted himself to prospective clients as a specialist in the Research and Development Tax Incentive (R&D Tax Incentive). Mr Bogiatto represented that he would assist them to obtain tax offsets under the R&D Tax Incentive for a percentage of any offset the client might obtain.

Mr Bogiatto assisted multiple clients by arranging for AusIndustry registration, and would provide each client with an R&D Tax Incentive Schedule containing figures that he advised the client to incorporate in their income tax return or in an amended income tax return.

Clients who acted on Mr Bogiatto's advice received substantial refunds from the ATO upon lodgment of their income tax return.

The Commissioner applied to the Court for orders that Mr Bogiatto and his associated companies (collectively 'the Respondents') had contravened the promoter penalty laws, and sought the imposition of civil penalties. The Commissioner pleaded separate contraventions by the Respondents for schemes promoted to 14 different clients (the Participants), alleging that the Respondents promoted to each Participant the availability of refundable R&D tax offsets where in fact those claims were not reasonably arguable.

## Issues decided by the Court

The Court (Thawley J) found that for 13 of the 14 Participants, the Respondents contravened the promoter penalty laws as they had engaged in conduct that had resulted in them or others being promoters of tax exploitation schemes (see subsection 290-50(1) of Schedule 1 to the *Taxation Administration Act 1953* (TAA)).

Thawley J reserved his decision, on the amount of penalty to be imposed, for further submissions.

Thawley J made several interpretative findings about the promoter penalty laws in the course of the judgment. Thawley J held that:

- an entity can be a promoter, as defined in section 290-60 of the TAA, of a tax exploitation scheme by receiving consideration that results in other entities being promoters of that scheme (at [75–78]), and
- the Commissioner was out of time to commence action for two cases where the scheme had not been implemented by the Participants, and the last acts of alleged promotion happened more than four years before the date of application. Contrary to the Commissioner's submissions, the unlimited period for the Commissioner to commence proceedings for a 'scheme involving tax evasion' could not apply to a scheme that was not implemented, as without implementation there could be no tax evaded (at [79–82]).

Thawley J noted that in the scheme of the promoter penalty laws, the Commissioner bears the onus of establishing that the elements of contravention are made out, one being that it was not reasonably arguable that the claimed scheme benefit was available at law. The Commissioner discharges that onus by establishing that the taxable facts were such that it was not reasonably arguable that the scheme benefits were available. Thawley J observed that in the particular schemes before the Court, where the claimed scheme benefit resulted from the application of the R&D tax offset, it was insufficient for the Commissioner to merely point to the fact that a Participant did not have adequate or contemporaneous records to evidence the R&D claim, however other evidence was available to discharge the onus (at [97–102]).

## ATO view of decision

The decision of the Court confirms that the promoter penalty laws can apply to promoters of bespoke arrangements for individual clients.

This confirmation advances the policy object of the law to:

- deter promotion of tax exploitation schemes and protect members of the community from their adverse effects, and
- preserve confidence in the tax system.

The ATO will continue to apply the law to advance these objects.

The ATO notes the Court's rejection of the Commissioner's argument that, on the operation of subsection 290-55(6) of the TAA, there can be an unlimited period for the Commissioner to commence proceedings for an unimplemented scheme. The ATO leaves open whether to re-test this point in an appropriate future case.

The ATO accepts the Court's views about the relevance of record keeping to the standard of evidence for the Commissioner to discharge the onus of proving that a promoted scheme benefit, involving the claim of the R&D tax offset, was not reasonably arguable at law.

The ATO considers that these views are specifically directed to the discharge of the onus of proof in applications made by the Commissioner under the promoter penalty laws, and have no relevance to the onus of proof that is on a taxpayer to establish that an assessment is excessive in a review or appeal against an objection decision under Part IVC of the TAA. In those contexts, and in any review or audit, the taxpayer is required to positively show that they are entitled to the underlying claim.

## **Implications for impacted advice or guidance**

The ATO is updating Law Administration Practice Statements PS LA 2008/7 *Application of the promoter penalty laws (Division 290 of Schedule 1 to the Taxation Administration Act 1953) to promotion of tax exploitation schemes* and PS LA 2008/8 *Application of the promoter penalty laws (Division 290 of Schedule 1 to the Taxation Administration Act 1953) to schemes involving product rulings* and will consider incorporating the decisions in the replacement guidance.

## **Comments**

We invite you to advise us if you feel this decision has consequences we have not identified. Please forward your comments to the contact officer.

<b>Date issued:</b>	4 February 2021
<b>Due date:</b>	5 March 2021
<b>Contact officer:</b>	Contact officer details have been removed as the comments period has expired.

**Legislative references**

*Taxation Administration Act 1953*

Sch 1 Division 290

Subsection 290-50(1)

Subsection 290-55(6)

Section 290-60

Part IVC

**Other references**

PS LA 2008/7

PS LA 2008/8