

# ***MT 2008/2A5 - Addendum - Shortfall penalties: administrative penalty for taking a position that is not reasonably arguable***

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## Addendum

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### Miscellaneous Taxation Ruling

#### Shortfall penalties: administrative penalty for taking a position that is not reasonably arguable

This Addendum is a public ruling for the purposes of the *Taxation Administration Act 1953* (TAA). It amends Miscellaneous Taxation Ruling MT 2008/2 to reflect amendments to the TAA contained in the *Tax Laws Amendment (Countering Tax Avoidance and Multinational Profit Shifting) Act 2013* (Amendment Act). Under the Amendment Act an entity will be liable to a scheme penalty under subsection 284-145(2B) of the TAA where the transfer pricing provisions in Subdivisions 815-B or 815-C of the *Income Tax Assessment Act 1997* apply. Where this penalty applies, the Amendment Act inserts Subdivision 284-E that states that an entity *will not* be eligible to argue a reasonably arguable position for a matter if the entity has not met specific documentation requirements for that matter. It also updates references to:

- Draft Taxation Ruling TR 2014/D4 being finalised as Taxation Ruling TR 2014/8, and
- Draft Law Administration Practice Statement PS LA 3672 being finalised as Law Administration Practice Statement PS LA 2014/2.

#### **MT 2008/2 is amended as follows:**

##### **1. Paragraph 35A**

Omit the paragraph; substitute:

35A. There is an additional requirement for transfer pricing scheme penalties. Where an entity does not have a documented transfer pricing treatment under Subdivision 284-E, Division 284 will apply as though a matter were not reasonably arguable. Paragraphs 67 to 87 of Law Administration Practice Statement PS LA 2014/2 *Administration of transfer pricing penalties for income years starting on or after 29 June 2013* provide guidance on the process for considering whether an entity has a documented transfer pricing treatment as part of deciding whether the entity has a reasonably arguable position for a particular treatment.

## 2. Paragraph 51A, heading

Omit the heading; substitute:

*Documenting a transfer pricing treatment for eligibility to take a reasonably arguable position*

## 3. Paragraphs 51B to 51E (including heading)

Omit the paragraphs including the heading; substitute:

*Transfer Pricing Scheme Penalties: Documenting a transfer pricing treatment for eligibility to take a reasonably arguable position*

51B. Section 284-250 states that if, an entity does not have records explaining the particular way in which the transfer pricing rules apply (or do not apply) to a matter (or identical matters) (referred to as 'transfer pricing treatment'), then that treatment will not be a reasonably arguable position for administrative penalty purposes. The specific requirements for documenting a transfer pricing treatment in a way so that the treatment is eligible to be taken as reasonably arguable are set out in section 284-255 ('documentation requirements').

51C. If an entity has not met the requirements for documenting a transfer pricing treatment (referred to as an 'undocumented transfer pricing treatment'), the entity cannot take a reasonably arguable position concerning that undocumented treatment. If an entity has met the requirements for having a 'documented transfer pricing treatment', that entity is eligible to take a reasonably arguable position, for the purposes of Division 284, for that treatment.

51D. Guidance on the documentation requirements can be found in paragraphs 72 to 79 of Law Administration Practice Statement Law Administration PS LA 2014/2 *Administration of transfer pricing penalties for income years starting on or after 29 June 2013*. PS LA 2014/2 sets out the process for determining whether an entity will have a documented or undocumented transfer pricing treatment when assessing transfer pricing scheme penalties.

51E. Further guidance on the documentation requirements is contained in Taxation Ruling TR 2014/8 *Income tax: transfer pricing documentation and Subdivision 284-E*. This ruling sets out the ATO's view on documenting a transfer pricing treatment contemporaneously.

**4. Detailed contents list**

- (a) Omit:
- Documenting a reasonably arguable position* 51A
  - Transfer Pricing Scheme Penalties: Documenting a reasonably arguable position* 51B
- (b) Insert:
- Documenting a transfer pricing treatment for eligibility to take a reasonably arguable position* 51A
  - Transfer Pricing Scheme Penalties: Documenting a transfer pricing treatment for eligibility to take a reasonably arguable position* 51B

**5. Related Rulings/Determinations**

- (a) Omit 'TR 2014/D4'; substitute 'TR 2014/8'.
- (b) Insert 'MT 2008/1'

**6. Legislative references**

- (a) Omit:
- ITAA 1997 Subdiv 815-B
  - ITAA 1997 Subdiv 815-C
  - TAA 1953 Sch 1 284-75(1A)
  - TAA 1953 Sch 1 284-160(a)(ii)
  - TAA 1953 Sch 1 284-160(b)(ii)
  - TAA 1953 Sch 1 284-215(1)(b)(i)
  - TAA 1953 Sch 1 284-215(1)(b)(ii)
  - TAA 1953 Sch 1 284-215(1)(b)(iii)
  - TAA 1953 Sch 1 284-215(2)
  - TAA 1953 Sch 1 286-75(1A)
  - Tax Laws Amendment (Countering Tax Avoidance and Multinational Profit Shifting) Act 2013
- (b) Insert:
- ITAA 1997 995-1
  - TAA 1953 Sch 1 284-224(1)
  - TAA 1953 Sch 1 284-224(1)(a)
  - TAA 1953 Sch 1 284-224(1)(b)
  - TAA 1953 Sch 1 284-224(1)(c)
  - TAA 1953 Sch 1 284-255

## 7. Other references

(a) Omit:

- Law Administration Practice Statement PS LA 2006/2
- Law Administration Practice Statement PS LA 3672

(b) Insert:

- Law Administration Practice Statement PS LA 2014/2

This Addendum applies on and from 17 December 2014.

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### Commissioner of Taxation

17 December 2014

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#### ATO references

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