TR 92/10 - Income tax: remission of additional tax imposed by subsection 223(1)

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Taxation Ruling
Income tax: remission of additional tax imposed by subsection 223(1)

other Rulings on this topic

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*This Ruling, to the extent that it is capable of being a 'public ruling' in terms of Part IVAAA of the **Taxation Administration Act 1953**, is a public ruling for the purposes of that Part . Taxation Ruling TR 92/1 explains when a Ruling is a public ruling and how it is binding on the Commissioner.*

What this Ruling is about

1. This Ruling deals with the remission of additional tax imposed under subsection 223(1) for the making of a false or misleading statement in relation to income tax affairs.

2. This Ruling explains how the Commissioner will use his general power of remission under subsection 227(3) to apply the principles of the penalty provisions of the *Taxation Laws Amendment (Self Assessment) Act 1992* ["TLA(SA)A"] to false or misleading statements made in relation to income tax returns for the 1991-92 year. The Ruling also covers the effect on the remission power of changes to the rate of interest under subsection 170AA of the *Income Tax Assessment Act 1936* ["ITAA"]

Ruling

Preamble

3. Subsection 223(1) of the ITAA automatically imposes additional tax where a taxpayer makes a statement that is false or misleading in a material particular which results in an understatement of tax. The Commissioner has the power to remit the whole or any part of the additional tax imposed for a false or misleading statement under section 227 of the ITAA. In exercising this power of remission, the Commissioner generally reduces the additional tax imposed under section 223 to an amount consisting of a "culpability" component and a "per annum" component [Taxation Ruling IT 2517].

4. The amendments to the penalty and interest provisions introduced by the TLA(SA)A apply to tax shortfalls for the 1992-93 year of income and all subsequent years [but excluding substituted

accounting periods that are in lieu of the 1992-93 year of income that commence before 1 July 1992] and franking tax shortfalls for the franking years that commence on or after 1 July 1992.

5. The self assessment legislation provides, amongst other things, more certainty and greater consistency in relation to the administration of penalties. In order to provide taxpayers with these benefits, the principles of this legislation are being brought forward to the 1991-92 income year. This will be achieved by the Commissioner using his power of remission under subsection 227(3) of the ITAA in a manner which would apply the principles of the penalty provisions of the self assessment legislation to false or misleading statements made in relation to income tax returns for the 1991-92 year. Further, the rate of interest used to calculate the "per annum" component of the penalty will be reduced in line with the reduction to 10% p.a. in the interest payable under section 170AA of the ITAA for understatements of tax.

Application of Ruling

6. The principles of the self assessment penalty legislation and changes to section 170AA rate of interest are to apply to income tax returns for the 1991-92 income year where an amendment is made after 30 June 1992. For reasons of equity, consistency and ease of administration, the principles of the self assessment legislation will not apply to income tax returns for income years prior to 1991-92.

Application of Section 223

7. Under the self assessment penalty legislation, a taxpayer may be liable to a penalty where there is a tax shortfall (i.e. the gross amount by which a taxpayer has understated a tax liability). It is not necessary that a taxpayer make a false or misleading statement. Penalty tax imposed by section 223 of the ITAA requires, as a prerequisite to its application, a finding that a false or misleading statement was made in relation to a taxpayer's tax affairs. A penalty under section 223 may, therefore, only be imposed within the meaning of this Ruling where a tax shortfall arises as a result of a false or misleading statement made by the taxpayer. Whether a false or misleading statement has been made [Taxation Ruling IT 2141] is to be determined having regard to the taxpayer's return forms and the information kept by the taxpayer that existed at the time the return was lodged [Taxation Rulings IT 2624 and IT 2662]

Penalty ["culpability component"]

8. The Commissioner's power of remission under section 227 of the ITAA will be used to apply the range of penalties for tax shortfalls prescribed under the self assessment penalty legislation to the "culpability" component of additional tax imposed under section 223. This means that where taxpayers exercise reasonable care in conducting their tax affairs no "culpability" component will be imposed. However, where reasonable care is not exercised, the relevant penalty prescribed under the self assessment legislation will be applied as a "culpability" component. In this respect, paragraphs 41 and 56 of Taxation Ruling IT 2517, and the examples provided as attachments, are modified so as to reflect the prescribed rate of penalty contained in the self assessment legislation, as indicated below;

CULPABLE BEHAVIOUR	PRIMARY PENALTY
Deliberate evasion	75%
Recklessness	50%
Carelessness	25%
Minor cases of carelessness	0% or 25%
Inadvertent error;	0% or 25%
- dependent on the degree of care	
Honest mistake	0%
Contentious issue	0%
Genuine misunderstanding of law	0%
Not expected to know	0%
Misled by the ATO	0%
Taxpayer uses a tax agent	(per taxpayer rates)

The above rates are intended as a general guide only to the use of the Commissioner's discretion as each case will depend upon its own particular facts.

9. In addition to the requirement that a false or misleading statement exist and the need to exercise reasonable care, taxpayers with large adjustments [generally $10,000 or 1% of the tax payable on the basis of the return , whichever is the greater] will be required to ensure that the position they adopt on a question of interpretation [including a conclusion of fact] is reasonably arguable at the time the position was taken. Failure to have a reasonably arguable position

will attract a penalty of 25% of the related tax shortfall whereas, conversely, if the matter is reasonably arguable no penalty will apply.

10. Penalties may be increased by 20% of the penalty if a taxpayer hinders the Commissioner's enquiries, or decreased by 20% of the penalty if the taxpayer discloses a tax shortfall to the Commissioner during an audit. In this respect, paragraphs 42-44 and 46-52 of Taxation Ruling IT 2517, and the examples provided as attachments, are modified so as to reflect the principles and variations to penalty rates for hindrance and co-operation contained in the self assessment legislation.

11. Taxpayers who voluntarily disclose a tax shortfall before the Commissioner commences an audit of their affairs will have the penalty reduced by 80%. In this respect, paragraphs 21-22 of Taxation Ruling IT 2517 are modified so as to reflect the discount for voluntary disclosure contained in the self assessment legislation.

12. There will, inevitably, be exceptional cases where the prescribed rate of penalty may not provide a just result. In such cases, the Commissioner may remit, in whole or in part, the penalty prescribed in paragraph 8 above. It is intended that any such remission would only need to be used infrequently and would depend upon the facts of the particular case. For example, this discretion would be used, in accordance with Taxation Ruling IT 2645, in substantiation cases where it is possible to accept that expenditure has been incurred even though the substantiation provisions have not been technically observed.

Interest ["per annum" component]

13. The Commissioner's powers of remission will continue to be used to apply a "per annum" component to additional tax imposed under section 223. However, the "per annum" component will be reduced to 10% p.a. as from 1 July 1992 in line with the reduction in the rate prescribed under paragraph 170AA(4)(b). In addition, the 10% p.a. rate for the "per annum" component will also apply to underpayments of tax related to false or misleading statements made in respect of income tax returns for the 90-91 and prior income years for amounts underpaid from 1/7/92.

14. The "per annum" component of additional tax is imposed in all cases of tax shortfalls resulting from a false or misleading statement regardless of whether any "culpability" component is also imposed.

15. The "per annum" component of additional tax imposed under section 223 is not an allowable deduction for income tax purposes.

Tax Avoidance and Profit Shifting

16. This Ruling does not attempt to deal with how the principles of the penalty provisions of the TLA(SA)A apply to false or misleading

statements made in cases of tax avoidance and profit shifting. These subjects will be dealt with in a subsequent Ruling.

Date of effect

17. The above arrangements apply only to amendments made after 1 July 1992 to income tax returns for the 1991-92 year. In this respect, Taxation Ruling IT 2517 is modified in relation to the rate of the culpability component from the 91-92 income year.

18. Taxation Ruling IT 2517 will not apply in regard to the 1992-93 and subsequent income years due to the repeal of section 223. However, it will continue to apply to the remission of penalties for the 1990-91 and prior income years.

19. The 10% rate for the "per annum" component of additional tax will apply to underpayments of tax for the 1991-92 and prior income years for amounts underpaid from 1/7/92.

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