MT 2008/3EC - Compendium

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The edited version of the Compendium of Comments is a Tax Office communication that is not intended to be relied upon as it provides no protection from primary tax, penalties, interest or sanctions for non-compliance with the law. In accordance with PS LA 2008/3 it only affords level 3 protection.

Ruling Compendium – MT 2008/3

This is a compendium of responses to the issues raised by external parties to draft MT 2008/D3 – Shortfall penalties: voluntary disclosures.

This compendium of comments has been edited to maintain the anonymity of entities that commented on the draft ruling.

Summary of issues raised and responses

Issue No.	Paragraph reference	Issue raised	Tax Office Response/Action taken
1.	General	In respect of the timing of voluntary disclosures the Draft Ruling fails to reflect the scope of the views expressed by the JCPAA in *Report 410* on the issue of 'commencing audits'. The JCPAA noted: 5.72 … The penalties and interest report recommended that the ATO provide clearer guidance on when an audit starts and give entities an opportunity to make voluntary disclosures prior to an audit formally commencing… It is suggested that the draft Ruling should be recast in light of the comments by the JCPAA.	Disagree. The ruling provides the Commissioner's interpretation of the voluntary disclosure provision – section 284-225 of Schedule 1 to the *Taxation Administration Act 1953* (TAA). This section does not require the Commissioner to give entities an opportunity to make voluntary disclosures prior to an audit formally commencing – this is a practice issue which is not appropriate for inclusion in this ruling.
2.	44 to 48	The term 'accounting period' is not defined and is obviously intended to be a flexible concept which may be used in relation to different kinds of income tax liability. The explanatory memorandum for the A New Tax System (Tax Administration) Bill (No 2) 2000 makes it clear that the term is intended to apply to different accounting periods. The explanatory memorandum states: Accounting period 1.56 The accounting period is the period for which the tax-related liability or credit is calculated. The period is not necessarily a financial year and may differ accounting to the type of tax involved. Table 1.3 provides some examples of accounting periods for a number of tax obligations.	Author's comment The Commissioner does not consider that the words 'accounting period' include a taxable importation. The Commissioner's view, as outlined in paragraphs 44 to 48 of the draft ruling, is that the words 'for an accounting period' merely serve to identify a type of shortfall amount to which the section applies, and should not be read as limiting the application of the section to *only* shortfall amounts or scheme shortfall amounts that arise for an accounting period. It is clear from subsection 284-80(1) of Schedule 1 to the TAA that shortfall amounts can also arise in relation to taxable importations. The application of provisions other than section 284-225 of

		Table 1.3 Relevant accounting period Tax obligation — Accounting period Income tax — income year, 1 July to 30 June (or substituted accounting period) FBT — FBT year, 1 April to 31 March GST — Monthly or quarterly tax period PAYG Withholding — Weekly, quarterly or monthly PAYG Instalments — Quarterly or annually Even recognising the flexibility of the concept, it clearly relates to an amount or a credit that is to be made to a person 'for a period' and it is difficult to manipulate the plain words so that they apply to a shortfall amount in relation to a particular event. However, the situation would be different where a statement results in an amendment to a BAS and as a result, a payment (or refund) is made on a monthly or quarterly basis. There is also a clear distinction within subsection 284-75(1) of Schedule 1 to the *Taxation Administration Act 1953* (TAA) between shortfall amounts for taxable importations and those for accounting periods. Given this distinction, it is unclear how the term 'accounting period' can be considered to include a taxable importation. If this interpretation of 'accounting period' is the position the Tax Office intends to take, then the position needs to be reflected in a taxation ruling on increasing penalties and the exceptions in section 284-215 of Schedule 1 to the TAA as the same issue arises. That is, the provisions relating to increasing penalty amounts refers only to shortfall amounts for an accounting period and not shortfall amounts for taxable importations.	Schedule 1 to the TAA to taxable importations is outside the scope of this ruling.

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3.	49	The definition of 'tax audit' should not include reviews because: • The Tax Office in recent years has been treating reviews as not constituting tax audits, and giving entities the automatic 80% reduction in penalty for voluntary disclosures made during the course of a review • Tax Office publications differentiate between reviews and audits • Tax Office letters state 'this is a review not an audit' • Audit insurance premiums will skyrocket • Reviews are not an examination of an entity's financial affairs.	Disagree. It is acknowledged that in recent years a practice has emerged where reviews were not treated as constituting a tax audit. However, the definition of 'tax audit' in subsection 995-1(1) of the *Income Tax Assessment Act 1997* is very broad, and will include reviews. This is consistent with the former Tax Office view in Taxation Ruling TR 94/6. The Commissioner undertakes a range of compliance activities/products which meet the definition of 'tax audit', including reviews, audits, verification checks, record-keeping audits, etc. Our publications differentiate between reviews and audits so that the entity will know what they can expect, and what their rights and obligations are, under a review product as opposed to an audit product. They are plain English documents, designed to give entities a simple overview of our activities. From the release of the draft ruling, business lines have been advised to cease saying that reviews are not audits. Although they are not audits, they are 'tax audits', and such statements would cause entities and their representatives confusion. An examination of a number of audit insurance policies has found that none of the policies define the scope of the policy by reference to what the Tax Office calls a 'tax audit'. Indeed the vast majority of policies examined had risk reviews specifically included in the scope of the policy already. It is considered that reviews do involve an examination of an entity's financial affairs, as they involve examining things such as tax returns, financial documents, contracts, invoices, etc. Given the concerns raised in relation to this issue, the date of effect in relation to this particular issue will be prospective from the date of issue of the final ruling.

4.	54	There is no legal obligation imposed on an entity to disclose a shortfall amount once it has occurred. The essential criterion for voluntariness is whether the entity made the voluntary disclosure when it did not have to do so. That is, a disclosure should be regarded as being made voluntarily unless the entity was legally required to provide it, for example in direct response under oath to a question asked under section 264 of the *Income Tax Assessment Act 1936*.	Disagree. We think this submission takes too broad a view of the meaning of 'voluntary'. Taking such a generous position for taxpayers could damage the integrity of the self-assessment system by offering undue encouragement to taxpayers to hold off making a full and true disclosure (until it becomes apparent they may be legally required to divulge information).
5.	55	The fact that the Commissioner may be about to uncover the shortfall amount is irrelevant to the question of voluntariness.	Author's comment The principle in paragraph 55 of the draft ruling is not that a disclosure is not made voluntarily if the Commissioner is about to uncover the shortfall amount, but rather the disclosure is not made voluntarily *if the entity would not have made the disclosure* apart from the fact that the Commissioner was about to uncover the shortfall amount. This is directly relevant to the meaning of 'voluntarily'.
6.	56 to 58, example 2	In this example Frank voluntarily told the Commissioner because he did not have to do so.	Disagree. The disclosure made is not regarded as having been made voluntarily. This example is based on the AAT case of *Interest Pty Ltd & Others v FCT* (2001) 2001 ATC 2282; (2001) 48 ATR 1067. In that case, the AAT said of the disclosure: 'There was nothing voluntary about the disclosures made to the ATO. The game was well and truly up.' (paragraph 30 of the judgment).
7.	59 and 60, example 3	The disclosure in this example is a voluntary disclosure.	Agree. This is the conclusion reached in the example – see paragraph 60 of the draft ruling.

8.	63 and 64, example 4	Whilst the Commissioner was already aware of the omission of interest which was a potential shortfall amount, Raj nonetheless told him that it was a shortfall amount and as such there has been a disclosure.	Disagree. It has been the Commissioner's long-standing view (see paragraph 45 and example 4 of TR 94/6) that to qualify for a reduction in penalty the entity must make, voluntarily, disclosures of information not otherwise known to the Commissioner. It is considered that there is no such disclosure in this example.
9.	66 to 68	These paragraphs are misconceived to the extent that they fail to recognise the statutory inducement to tell the Commissioner of a shortfall amount. The operation of the words 'voluntarily tell' in subsections 284-225(1) and 284-225(5) does not assume a level of cooperation and assistance by the entity that is well above that ordinarily expected of an entity during the conduct of a tax audit. An entity is under no duty to disclose a shortfall amount. Further, the Commissioner does not have the power to set a benchmark as to what an entity's behaviour in an audit ought to be. A taxpayer's behaviour is to be determined by the obligations imposed on it under the various taxation acts, neither more nor less. If an entity satisfies those obligations it ought not be precluded from making a voluntary disclosure simply because the Commissioner forms the view that the entity ought to have acted in a different (and more cooperative) way. More importantly the criteria for the reduction of the base penalty amount is not the entity's behaviour, it is the significant saving in the Commissioner's time or resources.	Disagree. The word 'voluntary' occurs here in a context where direct contact has been made by the Commissioner with the taxpayer or agent. As such, we consider that whilst a disclosure may not be truly voluntary in the sense that it is not unprompted, a certain level of cooperation and assistance is still necessary in order to qualify as a voluntary disclosure in this context. It would not be appropriate that instances of minimum disclosure and limited co-operation qualify as voluntary disclosures.
10.	72 to 76	It has not been demonstrated that paragraphs 39 to 45 of TR 94/6 were deficient in some fashion. The new paragraphs 72 to 76 are inadequate.	Disagree. The principles in paragraphs 39 to 45 of TR 94/6 are the same principles that have been incorporated into MT 2008/D3.