TR 93/D22 - Income tax: shortfall penalties: voluntary disclosures

This cover sheet is provided for information only. It does not form part of *TR 93/D22 - Income tax: shortfall penalties: voluntary disclosures*

This document has been finalised by TR 94/6.

Draft Taxation Ruling
Income tax: tax shortfall penalties: voluntary disclosures

Draft Taxation Rulings (DTRs) represent the preliminary, though considered, views of the Australian Taxation Office.

DTRs may not be relied on by taxation officers, taxpayers and practitioners. It is only final Taxation Rulings which represent authoritative statements by the Australian Taxation Office of its stance on the particular matters covered in the Ruling.

contents para

What this Ruling is about 1

Legislative Framework 5

Ruling 7

Date of effect 12

Explanations 16

Disclosures made before being informed of a tax audit - sections 226Z, 226E and 160ARZK 16

Threshold 30

Disclosures made after being informed of a tax audit - sections 226Y, 226D and 160ARZJ 32

Time at which taxpayer is informed of a tax audit 39

Commissioner's discretion to treat disclosure as having been made before taxpayer informed of a tax audit 44

Penalties in "self amendment" cases 47

Prosecution of taxpayers who have made voluntary disclosures 50

Examples 53

What this Ruling is about

1. This Ruling outlines the Australian Taxation Office (ATO) policy on voluntary disclosures for the purpose of administering sections 226Y, 226Z and 226ZA (relating to penalties in respect of tax shortfalls), sections 226D, 226E and 226F (relating to penalties in respect of tax avoidance schemes) and sections 160ARZJ, 160ARZK and 160ARZL (relating to penalties in respect of franking tax shortfalls) of the *Income Tax Assessment Act 1936* (ITAA). Specifically, it provides guidelines on:

- the circumstances under which a disclosure will be taken to qualify for an 80% reduction of the penalty otherwise attracted;
- the circumstances under which a disclosure will be taken to qualify for a 20% reduction of the penalty otherwise attracted;
- the point at which a taxpayer will be taken to have been informed that a tax audit is to be carried out;
- the circumstances under which the Commissioner will exercise his discretion to treat a disclosure as having been made before the taxpayer was informed of a tax audit.

2. The Ruling also states ATO policy on prosecution action against taxpayers who have made voluntary disclosures.

3. The Ruling is expressed in terms of tax shortfall penalties. However, as the voluntary disclosure provisions relating to scheme penalties and franking tax shortfall penalties are substantially the same as those relating to tax shortfall penalties, the guidelines provided by this Ruling apply, subject to the necessary changes, to cases where the scheme penalties or franking tax shortfall penalties are in question. The relevant sections relating to the scheme penalties and franking tax shortfall penalties have been noted in brackets where appropriate.

4. Taxation Ruling TR 92/10, in particular paragraphs 10 and 11 of that Ruling, should be read in conjunction with this Ruling for the purpose of determining the nature of the modifications to be made to Taxation Ruling IT 2517 in respect of the remission of subsection 223(1) additional tax in relation to the 1991-92 year of income.

Legislative Framework

5. The *Taxation Laws Amendment (Self Assessment) Act 1992* introduced, among other things, new penalty provisions into Part VII of the ITAA that apply where a taxpayer has a tax shortfall. Penalty is attracted at specified rates for breaches of the new penalty standards. The law provides that the rates of penalty otherwise attracted are reduced by a set amount in certain circumstances. These are:

(a) where a taxpayer voluntarily tells the Commissioner in writing about a tax shortfall or part of a tax shortfall for a year *before* the Commissioner has informed the taxpayer that a tax audit relating to the taxpayer in respect of the year was to be carried out - section 226Z (and sections 226E and 160ARZK). In these cases the penalty is reduced:

- if the shortfall or part is less than $1,000 - to nil;

- if the shortfall or part is $1,000 or more - by 80%;

(b) where a taxpayer voluntarily tells the Commissioner in writing about a tax shortfall or part of a tax shortfall for a year *after* the Commissioner has informed the taxpayer that a tax audit was to be carried out, and it could reasonably be estimated that telling the Commissioner has saved the Commissioner a significant amount of time or significant resources in the audit - section 226Y (and sections 226D and 160ARZJ). In these cases the penalty is reduced by 20%.

6. The Commissioner has a discretion to treat a disclosure that is made by a taxpayer after the taxpayer has been informed that a tax audit is to be carried out as having been made before the taxpayer was so informed - section 226ZA (and sections 226F and 160ARZL). The Commissioner may exercise the discretion where he considers it appropriate in all of the circumstances. The effect of the Commissioner exercising his discretion is that a taxpayer would obtain an 80% reduction in the penalty otherwise attracted in respect of the tax shortfall disclosed rather than a 20% reduction.

Ruling

7. In order for a disclosure made by a taxpayer before the taxpayer is informed of a tax audit to qualify for an 80% reduction of the penalty otherwise attracted the disclosure must be made voluntarily and must be a full and true statement of all the relevant material facts that will allow the Commissioner to make a correct adjustment of the taxpayer's assessment in respect of the matter that is disclosed. The disclosure generally will be treated as having been made voluntarily if it is made before any contact by the ATO with the taxpayer or the taxpayer's representative, whether the contact is about a tax audit, as defined for the purposes of the tax shortfall penalties, or for some other purpose. However, certain disclosures will be treated as having been made voluntarily, notwithstanding they are made after contact is first made by the ATO, where it is clear that the disclosure was not prompted or influenced by the ATO contact.

8. A disclosure by a taxpayer after the taxpayer has been informed of a tax audit will generally qualify for a 20% reduction of the penalty otherwise attracted if it is made before detailed enquiries are commenced into the matter disclosed and the disclosure enables a correct adjustment of the taxpayer's assessment to be made. The timing and nature of the disclosure should be such that it could be reasonably estimated to have saved significant time and resources in the audit. In this context a disclosure will be voluntary if it represents a level of co-operation and assistance by the taxpayer that is well above what is ordinarily expected of a taxpayer during the conduct of an audit.

9. The time at which a taxpayer is taken to have been informed of a tax audit is the time when the ATO first contacts the taxpayer or the taxpayer's representative. A tax audit includes audits to ascertain a taxpayer's proper income tax liability, record keeping audits, tax strategy reviews, monitoring or watching briefs, source deduction audits and FBT audits. It should be noted that even if a disclosure is made before the taxpayer is informed of a tax audit, the disclosure still needs to have been made voluntarily to qualify for the 80% reduction in penalty otherwise attracted.

10. The Commissioner will generally exercise his discretion to treat a disclosure as having been made before the taxpayer was informed of a tax audit where there was only a slight prospect that the tax shortfall disclosed would have been detected during the audit, or where it may be reasonably concluded that the taxpayer would have made the disclosure even if the tax audit had not been commenced. However, this Ruling does not fetter authorised officers when exercising the discretion. Each case should be decided on the basis of its own facts and circumstances.

11. The fact that a person has made a voluntary disclosure does not necessarily preclude a prosecution. The decision whether to prosecute in such cases will be taken on the advice of the DPP. In no case should a tax officer provide an undertaking to a taxpayer that the taxpayer will not be prosecuted.

Date of effect

12. This Ruling (that is, the final Taxation Ruling based on this Draft Taxation Ruling), to the extent it is concerned with the interpretation of sections 226Y, 226Z, 226D, 226E, 160ARZJ and 160ARZK, sets out the current practice of the ATO and is not concerned with a change in interpretation. Consequently, it applies from the date those sections commenced to operate.

13. To the extent the Ruling provides guidelines for the exercise of the discretions contained in sections 226ZA, 226F and 160ARZL it applies in respect of exercises of those discretions after the date on which this Ruling is issued.

14. To the extent that Taxation Ruling TR 92/10 should be read in conjunction with this Ruling it applies where the Commissioner's discretion to remit subsection 223(1) additional tax is exercised after the date on which this Ruling is issued.

15. To the extent this ruling relates to the possible prosecution of taxpayers who have made voluntary disclosures, it applies to both past and future years.

Explanations

Disclosures made before being informed of a tax audit - sections 226Z, 226E and 160ARZK

16. In order for a disclosure by a taxpayer to qualify for an 80% reduction in the penalty otherwise attracted, the disclosure must:

(i) be made before the taxpayer is informed of a tax audit;

(ii) be in writing and contain a full and true disclosure of all the relevant material facts necessary for the Commissioner to make a correct adjustment of the taxpayer's assessment in respect of the matter disclosed; and

(iii) be made voluntarily.

17. The first matter is discussed separately under the heading "Time at which taxpayer is informed of a tax audit" below (paragraphs 40 - 44).

18. Under (ii), the requirement that the disclosure be in writing is self explanatory. In terms of the extent of the disclosure required, if the disclosure is incomplete but the degree of incompleteness is insignificant, the case may still be treated as a disclosure which qualifies for the reduced rates of penalty.

19. A taxpayer may disclose one part of a tax shortfall, but not other parts of the tax shortfall. This may be because the taxpayer is only aware of one part of the shortfall. Provided the disclosure on the particular part of the shortfall is full and true, the taxpayer is entitled to the benefit of the reduced penalty rates in respect of the part of the shortfall disclosed. The part or parts of the shortfall not disclosed would continue, if appropriate, to attract additional tax at the normal (non-reduced) rates. On the other hand, if a taxpayer's disclosure in respect of a part of a tax shortfall is not sufficiently complete then the disclosure will not qualify for a reduction in penalty.

20. A taxpayer need not admit liability in respect of the shortfall disclosed. A taxpayer is eligible for the reduced penalty rates whether or not the taxpayer maintains an

opinion contrary to that of the Commissioner, or disputes the adjustment the Commissioner makes to the taxpayer's assessment.

21. In relation to (iii), a disclosure will be treated as having been made voluntarily if it is made without having been prompted by ATO action. That is, the disclosure generally must be made before the ATO first makes contact with the taxpayer or his or her representative (as defined in paragraph 27) - see *R v Morris* (1992) 24 ATR 1 at p.6; 92 ATC 4618 at p.4622. That contact may have indicated to the taxpayer that his or her affairs are being audited.

22. Contact with the taxpayer may comprise direct enquiries of the taxpayer, a letter or telephone call setting up an initial interview prior to an audit, a request for a statement of assets and liabilities, or an audit of the taxpayer's liability to other taxes. For instance, omitted income may be disclosed by a taxpayer consequent upon an audit for the purposes of sales tax or in connection with tax instalments deducted from salary or wages of employees under the PAYE system. Such disclosures should not generally be treated as voluntary (but note paragraphs 27-29 below).

23. A disclosure will be treated as having been made before any contact with the taxpayer even though enquiries by the ATO have been commenced and the taxpayer could reasonably expect that he or she will be the subject of an audit. An example would be where an employee of a company comes forward to declare omitted income from work done for a company after the ATO has begun issuing query letters progressively to other employees who are believed to have omitted income for work performed for that company. The employee would be accepted as having come forward voluntarily because the taxpayer had not received a letter from the ATO.

24. Similarly, where the ATO is conducting a project or review on an industry-wide or geographic basis, for example, taxpayers engaged in a particular profession or trade or taxpayers living in a certain district, this would not of itself preclude a taxpayer who is engaged in one or more of these industries or lives in a certain geographic region from the possibility of a voluntary disclosure on his or her part. Also, the mere listing of a taxpayer's name for future audit does not

preclude the taxpayer from making a voluntary disclosure, provided first contact has not been made by the ATO.

25. In the case of a partnership, however, a disclosure made by a partner after the ATO has first made contact with the representatives of the partnership of which he or she is a member is not regarded as voluntary. Similarly, a disclosure made by a taxpayer after first contact with a trust or private company in which the taxpayer is a principal beneficiary or shareholder (or director) should not be treated as voluntary if the disclosure relates to the taxpayer's interest in the trust or private company. A disclosure by a taxpayer following the audit of one of his or her relatives or other taxpayers in his or her district may be accepted as voluntary so long as no ATO action concerning the taxpayer personally or an associated partnership, trust or private company has been initiated.

26. For the purposes of this Ruling, a representative of the taxpayer is any person or entity which manages or acts as agent in respect of any part of the taxpayer's financial and/or taxation affairs, for example, the taxpayer's accountant, bookkeeper, financial advisor, solicitor or tax agent. A barrister's clerk is the barrister's agent (*R v Morris* 24 ATR at p.6; 92 ATC at p.4622).

27. Notwithstanding paragraphs 21 - 26, there may be cases where there is evidence that a disclosure, which has been made after contact was first made by the ATO with the taxpayer, has nevertheless been made voluntarily. This may be the case, for example, where the taxpayer was undertaking its own review of its tax affairs (often called a "prudential" audit) at the time contact was first made by the ATO, with a view to making a disclosure of any discrepancies it discovered. Where the evidence clearly supports that this is the case (including that the taxpayer intended to make disclosures), the disclosures made by the taxpayer may be accepted as voluntary, and so may qualify for the 80% reduction under section 226Z (and sections 226D and 160ARZK).

28. Similarly, where there is only a slight prospect that the matter disclosed would have been detected by the ATO activity, for instance, where the disclosure relates to a prior year and the ATO contact is in respect,

say, of a current year record keeping audit, then the disclosures may be accepted as voluntary.

29. It should be noted that where first contact by the ATO also constitutes the taxpayer being informed of a tax audit (as defined - see paragraph 40) the disclosures may only qualify for the 80% reduction if the Commissioner also exercises his discretion to treat the disclosures as having been made before the taxpayer was so informed (see paragraphs 44 - 46).

Threshold

30. Where the amount of a tax shortfall or a part of a tax shortfall voluntarily disclosed before the taxpayer is informed of a tax audit is equal to or greater than $1,000, the penalty otherwise payable in respect of that shortfall or part is reduced by 80%. If the amount of the shortfall or part of the shortfall disclosed is less than $1,000 the penalty otherwise payable is reduced to nil - section 226Z (and section 160ARZK). Note that under section 226E, relating to scheme cases, the reduction in penalty is 80% in all cases, irrespective of the amount of the disclosure.

31. Where a taxpayer makes more than one disclosure in respect of a particular year of income the disclosures should be added together to determine whether the $1,000 threshold has been exceeded. Thus, if a debit amendment has issued in respect of an initial disclosure of part of a shortfall of less than $1,000, and another disclosure is subsequently made in respect of the same year of income so that the sum of the parts of the shortfall disclosed is equal to or greater than $1,000, the penalty reduction provided in respect of the first disclosure would need to be revised.

Disclosures made after being informed of a tax audit - sections 226Y, 226D and 160ARZJ

32. Notwithstanding that a tax audit has commenced a taxpayer may still volunteer information to the Commissioner that will materially assist in the completion of the audit. A disclosure will qualify for a 20%

reduction in the penalty otherwise attracted if:

(i) it is made after the taxpayer has been informed that a tax audit was to be carried out;

(ii) it is in writing and brings all the relevant facts and other information to the attention of the Commissioner that will allow the Commissioner to readily identify the amount and nature of the shortfall;

(iii) it is made voluntarily; and

(iv) it could reasonably be estimated to have saved the Commissioner a significant amount of time or resources in the audit.

33. The first matter is discussed separately under the heading "Time at which taxpayer is informed of a tax audit" below (see paragraphs 39 - 43).

34. Under (ii), similar considerations apply as with disclosures made before an audit (see paragraphs 18 - 20).

35. In relation to (iii), where a matter disclosed is not within the formal scope of the audit, and/or no detailed enquiries have in fact been commenced into the particular matter, then a full and true disclosure by the taxpayer of the matter and the tax shortfall caused by it would ordinarily qualify as voluntary for the purposes of section 226Y (and sections 226D and 160ARZJ). However, a taxpayer who merely "comes clean" when caught should not be accepted as having made the disclosure voluntarily. In the context of disclosures made after a tax audit has commenced the term "voluntary" implies a level of co-operation and assistance by the taxpayer that is well above that ordinarily expected of taxpayers during the conduct of an audit. The requirement that the disclosure be voluntary is closely related to the requirement that the disclosure could reasonably be estimated to result in a significant saving in the time or resources taken to conduct the audit.

36. In relation to (iv), a disclosure made early during an audit is more likely to result in a significant saving of time and resources than a disclosure made later, especially where the disclosure relates to a matter that will clearly be examined during the course of the audit. It should be noted that the actual time

or resources spent on the audit does not in fact need to be less than was planned because of the disclosure that was made. It may be that the time saved is used in looking into other matters. What is required is that the disclosure made could be reasonably estimated to have saved a significant amount of time or resources in looking into the matter disclosed.

37. In some audit cases the general level of access granted to the taxpayer's records and the general level of assistance and co-operation provided by the taxpayer during the audit will result in a significant saving in the time and resources spent on the audit. In such cases an across the board discounting of penalties otherwise attracted may be appropriate on the basis of the "disclosures" made. Wherever possible, however, the reduced rates of penalty should be directly related to specific disclosures made in respect of specific matters.

38. The reduced rates of penalty for disclosures made during an audit are not attracted where a taxpayer is simply courteous or co-operative in responding to specific requests for information. To attract the reduced rates a taxpayer must make, voluntarily, disclosures of information not otherwise known to the auditor that lead to a significant saving in time or resources.

Time at which taxpayer is informed of a tax audit

39. Generally, a taxpayer will be treated as having been informed that a tax audit relating to the taxpayer for a particular year is to be carried out when the ATO first makes contact with the taxpayer or his or her representative about the audit. In this regard, the matters covered in paragraphs 21 - 26 above are again relevant. The criteria for determining whether a taxpayer has been informed of a tax audit are therefore largely the same as those for determining whether a disclosure has been made voluntarily for the purpose of qualifying for the 80% penalty reduction. The test is, however, a slightly narrower one because of the definition of tax audit (which does not include *all* audits the Commissioner may undertake, for example, sales tax audits - see paragraph 40) and because a

taxpayer must be informed of a tax audit in respect of a particular year - see paragraph 42. It should be noted that even if a disclosure is made before the taxpayer is informed of a tax audit, the disclosure must still be made voluntarily in terms of paragraphs 21 - 29.

40. For the purposes of the tax shortfall penalty provisions, "tax audit" is defined as "an examination of a person's financial affairs by the Commissioner for the purposes of a tax law" (subsection 222A(2) of the ITAA and subsection 14ZAA(1) of the *Taxation Administration Act 1953*). The definition is a very broad one and covers the usual audits the ATO undertakes to ascertain a taxpayer's proper liability to tax as well as other examinations of a taxpayer's affairs, including record keeping audits, tax strategy reviews, monitoring or watching briefs, source deduction audits (for example, PAYE, PPS) and FBT audits. It does not, however, include audits relating to taxes administered by the Commissioner which are assessed under Acts other than the ITAA and the *Fringe Benefits Tax Assessment Act 1986* (for example, sales tax).

41. To prevent harsh results arising because of the broad definition of a tax audit, the Commissioner's discretion to treat a disclosure as having been made before the taxpayer was informed of a tax audit should generally be exercised in cases where, because of the limited focus of a particular tax audit, there is only a slight prospect that the tax shortfall disclosed would have been detected by the tax audit (see further paragraphs 44 - 46).

42. Sections 226Y and 226Z (and sections 226D and 226E and sections 160ARZJ and 160ARZK) refer to a taxpayer being informed of a tax audit in respect of a particular year of income. Tax officers should accordingly be explicit about the years of income that are being reviewed when informing taxpayers that they are to be audited. While it will still be open for the ATO to look at other years, the taxpayer will be able to make a disclosure about those other years, which may still qualify for the 80% reduction in penalty otherwise attracted, until such time as the taxpayer is specifically informed that the audit will cover those years.

43. Whether a disclosure made by a taxpayer about a year other than the years under audit may be accepted as having been made *voluntarily* will depend on the facts. Where, for example, the disclosures relate to matters that were the subject of adjustment in the years that have been audited, and there is a real prospect that the audit will be extended to cover other years in respect of those matters (e.g. omitted business income) then the disclosure would not generally be accepted as having been made voluntarily. See further paragraphs 21 - 29.

Commissioner's discretion to treat disclosure as having been made before taxpayer informed of a tax audit

44. If a taxpayer makes a disclosure after being informed of a tax audit that is voluntary in terms of paragraph 35 then the Commissioner may, if he considers it appropriate in all of the circumstances, determine that for the purposes of sections 226Y and 226Z (and sections 226D and 226E and sections 160ARZJ and 160ARZK), the taxpayer is taken to have made the disclosure before being informed of the audit - section 226ZA (and sections 226F and 160ARZL). The effect of the exercise of the discretion is that the disclosure will qualify for the 80% reduction in the penalty otherwise attracted.

45. As a general rule, the discretion should be exercised in the following kinds of cases:

(a) where the prospect that the tax shortfall disclosed would have been detected is only slight, because the tax audit being undertaken has only a limited or narrow focus (such as a record keeping audit, a tax strategy review or a monitoring or watching brief, or an audit of a group of companies where a member of the group which is not the focus of the audit makes a disclosure); or

(b) where it may reasonably be concluded that the taxpayer would have made the disclosure even if the tax audit had not been commenced (such as where a company is undertaking a prudential audit at the time the ATO commences its audit and it could be reasonably concluded that the taxpayer was

going to disclose the outcome of the prudential audit irrespective of the tax audit).

46. In the end, authorised officers must make a decision in each case based on all of the facts. While this Ruling provides guidelines on how the discretion should be exercised, it is not intended to fetter officers in the exercise of the discretion.

Penalties in "self amendment" cases

47. The *Taxation Laws Amendment (Self Assessment) Act 1992* amended section 169A of the ITAA so that the Commissioner may accept statements made by taxpayers in amendment requests for the purposes of making an assessment. A "self amendment" is any case where the Commissioner accepts such statements, whether those statements are made on the special form made available by the Commissioner to tax agents for this purpose (the "tax agent amendment forms") or in a letter or other document to the Commissioner requesting an amendment.

48. A request for an amendment, whether on the special tax agent amendment form or otherwise, will usually be a voluntary disclosure, subject to the considerations covered by this ruling about whether it is made voluntarily and the time at which it is made. Accordingly, where the Commissioner, following a request from a taxpayer, amends an assessment to increase the liability of the taxpayer, and the increase in liability is less than $1,000, no penalty is attracted.

49. Where the increase in liability is $1,000 or greater, a penalty of 5% (being a penalty of 25% reduced by 80%) will be imposed, on the basis that the amount of the tax shortfall disclosed is an indication that the shortfall was caused by the taxpayer failing to take reasonable care. The rate of penalty imposed may be reviewed if information is presented which indicates that either no penalty, or a higher rate of penalty, is warranted.

Prosecution of taxpayers who have made voluntary disclosures

50. The fact that a person has made a voluntary disclosure does not necessarily preclude a prosecution. However, it is a factor to be taken into account in deciding whether the public interest requires criminal proceedings. The Director of Public Prosecutions (DPP) has advised that, as a general rule, it is unlikely that a person who has genuinely made a voluntary disclosure will be prosecuted, unless the offence exhibits a significant degree of criminality.

51. The decision whether to prosecute in such cases will be made on the advice of the DPP. In no case should a tax officer provide an undertaking to a taxpayer that the taxpayer will not be prosecuted.

52. Taxation Ruling IT 2246 is varied by this ruling to the extent that the two are inconsistent.

Examples

Example 1

53. The taxpayer, a sole trader, was advised that records of her business relating to the 1993 year of income were to be audited to ensure they were in order and complied with the requirements of the ITAA. When the auditor arrived to conduct the audit the taxpayer provided a written statement that a capital expense had been incorrectly claimed as a repair in her 1992 return. The statement outlined all the relevant details to correct the 1992 assessment.

54. The disclosure by the taxpayer would qualify for an 80% reduction of any penalty otherwise attracted. The disclosure was made before the taxpayer was informed of a tax audit for the year to which the disclosure related, as the record keeping audit related to the 1993 year of income. While the disclosure was made after the taxpayer was first contacted by the ATO, it may be accepted as having been made voluntarily, since the examination of the taxpayer's 1993 records was unlikely to have detected the shortfall disclosed in respect of the 1992 year.

55. Note that if the disclosure related to the same year as the record keeping audit it may still qualify for the 80% reduction in penalty otherwise attracted if it was accepted that it was unlikely to have been detected by the record keeping audit. In such a case, because the disclosure would have been made after the taxpayer had been informed of a tax audit for the relevant year, the Commissioner would have to exercise his discretion to treat the disclosure as having been made before the taxpayer was so informed.

Example 2

56. The taxpayer, a manufacturing company, was notified by the ATO that it intended undertaking an audit of the taxpayer's income tax affairs for the 1994 and 1995 years of income. The taxpayer immediately wrote to the Commissioner advising that it had recently contracted with an accounting firm to conduct a prudential audit of its 1995 return. Documents held by the taxpayer confirm that the contract was entered into before the taxpayer was notified of the ATO audit. The taxpayer has previously made voluntary disclosures.

57. The taxpayer subsequently makes disclosures in respect of the 1995 year of income. Although the disclosures are made after the taxpayer had been informed of a tax audit, the evidence suggests that the disclosures would have been made even if the ATO audit had not been commenced. Accordingly, the Commissioner would exercise his discretion to treat the disclosure as having been made before the taxpayer was so informed. For a similar reason the disclosures would also be accepted as having been made voluntarily, notwithstanding that they were made after the ATO first made contact with the taxpayer. The disclosures would therefore qualify for an 80% reduction in any penalty otherwise attracted.

Example 3

58. The taxpayer, a builder, was selected for audit for the 1993 and 1994 years of income. After the first six weeks of the audit the taxpayer disclosed that he had for the past three years (1992 - 1994) systematically failed to record $300 a month of business receipts which he had used for private purposes. The taxpayer is able to demonstrate that this is

all of the business receipts that he had failed to return by reference to his job book and other notes he had made which he had not previously disclosed to the auditor.

59. The disclosures would qualify for a 20% reduction of penalty otherwise attracted. For the 1993 and 1994 years they were made after the taxpayer had been informed of a tax audit, but represented a significant degree of assistance by the taxpayer which would have led to a significant saving in time and resources in conducting the audit.

60. For the 1992 year the taxpayer had not been informed of a tax audit. However, under the circumstances the disclosures could not be treated as having been made voluntarily. The taxpayer would be given the opportunity of putting the disclosures in writing after the taxpayer was specifically informed that the audit would extend to the 1992 year, so that the disclosures would qualify for a 20% reduction in penalty.

Commissioner of Taxation

22 April 1993

ISSN 1039 - 0731

ATO references
NO 93/2071-7
BO

Previously released in draft form as EDR 50

Price $1.40

FOI index detail
reference number

subject references
- additional tax
- prosecution
- self assessment
- tax shortfall
- voluntary disclosures

legislative references
- ITAA 160ARZJ; ITAA 160ARZK
- ITAA 160ARZL; ITAA 222A(2)
  ITAA 226D; ITAA 226E
- ITAA 226F; ITAA 226Y
- ITAA 226Z; ITAA 226ZA
- ITAA 14ZAA(1)

case references
- R v Morris (1992) 24 ATR 1
  92 ATC 4618