MT 2008/D3 - Shortfall penalties: voluntary disclosures

This document has been finalised by MT 2008/3.

Draft Miscellaneous Taxation Ruling

Shortfall penalties: voluntary disclosures

Contents Para

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What this Ruling is about

1. This Ruling outlines the Commissioner's interpretation of section 284-225 of Schedule 1 to the *Taxation Administration Act 1953* (TAA) which applies to voluntary disclosures. Specifically, it outlines the circumstances under which:

- a penalty otherwise attracted will be reduced to nil;
- a penalty otherwise attracted will be reduced by 80%; and
- a penalty otherwise attracted will be reduced by 20%.

2. This Ruling also provides guidelines on how the discretion in subsection 284-225(5) of Schedule 1 to the TAA may be exercised. In providing these guidelines, there is no intention to lay down conditions that may restrict the exercise of the Commissioner's discretion. Nor does the Ruling represent a general exercise of the Commissioner's discretion. Rather, the guidelines are provided to help tax officers in the exercise of the discretion and to help ensure that entities do not receive inconsistent treatment.

3. This Ruling also outlines the Commissioner's interpretation of some of the important concepts in section 284-225 of Schedule 1 to the TAA, specifically:

- what constitutes a 'tax audit';
- when an entity will be taken to have been told that a tax audit is to be conducted;
- the meaning of 'voluntarily tell' in the context of each subsection;

- the meaning of 'a significant amount of time or significant resources' for the purposes of subsection 284-225(1) of Schedule 1 to the TAA; and
- principles regarding the making of a voluntary disclosure.

4. This Ruling does not discuss what constitutes the approved form for making voluntary disclosures. The approved form can be found under the Forms section on the Tax Office website.[1]

5. This Ruling does not consider the application of section 284-225 of Schedule 1 to the TAA to shortfall amounts relating to a tourist refund scheme under Division 168 of the *A New Tax System (Goods and Services Tax) Act 1999* or Division 25 of the *A New Tax System (Wine Equalisation Tax) Act 1999*.

6. This Ruling does not consider the guidelines for the exercise of the Commissioner's discretion under section 298-20 of Schedule 1 to the TAA to remit the penalty otherwise attracted – see Law Administration Practice Statement PS LA 2006/2.

7. This Ruling also does not consider the methodology involved in calculating an administrative penalty where a shortfall amount needs to be split in order to apply different rates of penalty – see Taxation Ruling TR 94/3, which applied to former Part VII of the *Income Tax Assessment Act 1936* (ITAA 1936).

8. All legislative references in this Ruling are to Schedule 1 of the TAA, unless otherwise indicated.

9. A number of expressions used in the relevant legislative provisions are referred to in this Ruling. These expressions are defined in paragraphs 87 to 101 of this draft Ruling.

Date of effect

10. It is proposed that when the final Ruling is issued, it will apply both before and after its date of issue. However, the Ruling will not apply to entities to the extent that it conflicts with the terms of settlement of a dispute agreed to before the date of issue of the Ruling (see paragraphs 75 and 76 of Taxation Ruling TR 2006/10).

Previous Ruling

11. This Ruling updates Taxation Ruling TR 94/6. Accordingly, TR 94/6 is withdrawn from the date of issue of this Ruling.

[1] A hyperlink to the website is provided in the 'Other references' section at the conclusion of this draft Ruling.

Background

Legislative framework

12. A reduction in penalty otherwise applicable, for making a voluntary disclosure, was first introduced in the former penalty regime in Part VII of the ITAA 1936.[2] Section 226Y of the ITAA 1936 provided for a 20% reduction in penalty where the entity made a voluntary disclosure after being notified of a tax audit in relation to a year of income, and the disclosure could reasonably be estimated to have saved the Commissioner significant time or resources. An 80% reduction (or full reduction if the shortfall was less than $1,000) applied under section 226Z of the ITAA 1936 where the voluntary disclosure was made before notification of a tax audit. Section 226ZA of the ITAA 1936 contained a discretion for the Commissioner to treat a disclosure made after being notified of an audit as being made before being notified, thus entitling the entity to the greater reduction in penalty. Similar provisions also existed for penalties in respect of tax avoidance schemes[3] and franking tax shortfalls.[4]

13. These provisions do not apply to statements made in relation to the 2000-01 and later income years and were replaced by Division 284 of Part 4-25, specifically by section 284-225.

14. The administrative penalty regime, which includes Division 284, applies from 1 July 2000, in relation to:

- income tax matters for the 2000-01 and later income years;
- fringe benefits tax (FBT) matters for the year commencing 1 April 2001 and later years; and
- matters relating to other taxes for the year commencing 1 July 2000 and later years.

15. The regime sets out uniform administrative penalties that apply to entities that fail to satisfy certain obligations under different taxation laws.

16. The administrative penalty provisions consolidate and standardise the different penalty regimes that previously existed. In addition, the provisions apply in respect of various taxes and collection systems including income tax, FBT, goods and services tax (GST) and pay as you go withholding and instalments.

17. Division 284 imposes a penalty where an entity:

- makes a statement which is false or misleading in a material particular – subsection 284-75(1);

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[2] Under the penalties regime for false and misleading statements which predated the enactment of Part VII of the ITAA 1936 and self assessment, whether the entity had made a voluntary disclosure was a factor taken into account in the exercise of the Commissioner's discretion to remit the penalty that was automatically imposed.
[3] Sections 226D, 226E and 226F of the ITAA 1936.
[4] Sections 160ARZJ, 160ARZK and 160ARZL of the ITAA 1936.

- takes a position under an income tax law that is not reasonably arguable – subsection 284-75(2) (Draft Miscellaneous Taxation Ruling 2008/D2 explains the concept of reasonably arguable position);
- fails to provide a return, notice or other document to the Commissioner that is necessary to determine a tax-related liability accurately, and the Commissioner determines the liability without the assistance of the document – subsection 284-75(3);
- disregards a private ruling;[5] or
- enters into a scheme to get a scheme benefit – section 284-145.

18. If an entity is liable to an administrative penalty under Division 284, then under subsection 298-30(1) the Commissioner must make an assessment of the amount of the penalty. The assessment is made in accordance with the formula described in sections 284-85 (for shortfall amounts) and 284-155 (for scheme shortfall amounts):

- calculate the base penalty amount under subsection 284-90(1) (for shortfall amounts) or section 284-160 (for scheme shortfall amounts); and
- increase (section 284-220) or reduce (section 284-225) the base penalty amount if certain conditions are satisfied.

19. Section 284-225 provides for a reduction of the base penalty amount imposed under Division 284 for voluntary disclosures about a shortfall amount or a scheme shortfall amount.

20. The base penalty amount will be reduced by 20% where an entity voluntarily tells the Commissioner in the approved form about a shortfall amount or scheme shortfall amount *after* being told by the Commissioner that a tax audit of its financial affairs for a particular accounting period or taxable importation is to be conducted, and telling the Commissioner can reasonably be estimated to have saved the Commissioner significant time or resources in the tax audit.[6]

21. Where an entity voluntarily tells the Commissioner in the approved form about a shortfall amount or scheme shortfall amount *before the earlier of*:

- the day the entity is informed by the Commissioner that a tax audit is to be conducted; or

[5] This penalty does not apply in relation to income tax matters for the 2004-05 and later income years, FBT matters for the year beginning 1 April 2004 and later years, and matters relating to other taxes for the year beginning 1 July 2004 and later years.
[6] Subsection 284-225(1).

- the day by which the Commissioner, in a public statement, requests a voluntary disclosure to be made about a particular scheme or transaction;

the base penalty amount will be reduced by 80% (unless the disclosure relates to a shortfall amount that is less than $1,000, in which case it is reduced to nil).[7]

22. Furthermore, where an entity voluntarily tells the Commissioner in the approved form about a shortfall amount or scheme shortfall amount *after* being notified by the Commissioner of a tax audit, the Commissioner has a discretion under subsection 284-225(5) to treat the voluntary disclosure as if it was made *before* being notified of the tax audit.

23. A flow chart showing the operation of section 284-225 (excluding the exercise of the Commissioner's discretion in subsection 284-225(5)) is included at Appendix B of this draft Ruling.

Purpose of the voluntary disclosure provision

24. The purpose of the provision giving a reduction in penalty otherwise attracted is to encourage the making of voluntary disclosures by entities. This is the guiding principle to be applied in using the provision. While each case will be governed by its own facts, in borderline cases the benefit of any doubt should generally be given to the entity. However, a balance must be struck between encouraging voluntary disclosures and not rewarding entities which, hoping to avoid detection, defer making disclosures until such time as it becomes obvious that Tax Office activity is about to uncover a shortfall amount or scheme shortfall amount.

25. Section 284-225 provides substantial incentives for entities to review their taxation affairs and make a voluntary disclosure about any shortfall amount or scheme shortfall amount before the Commissioner begins a tax audit. The 80% reduction in penalty also acknowledges that entities which voluntarily disclose a shortfall amount or scheme shortfall amount without being prompted by direct action from the Commissioner should receive a substantially greater reduction than those who defer the making of disclosures until the Commissioner has informed the entity that a tax audit is to be conducted.

[7] Subsections 284-225(2), 284-225(3) and 284-225(4).

Ruling

Principles regarding the operation of section 284-225

26. The level of any reduction in penalty is dependent on when a voluntary disclosure is made. Generally, the reduction will depend on whether the entity has made the voluntary disclosure before or after they are notified by the Commissioner that a tax audit is to be conducted. However, if the Commissioner makes a public statement requesting entities to make a voluntary disclosure by a particular day, then the relevant point in time is before the earlier of:

- the day the entity is told by the Commissioner that a tax audit is to be conducted; or
- the day by which the Commissioner, in his public statement, requests the voluntary disclosure to be made.

27. In order for a public statement to be relevant for the purposes of section 284-225, it must:

- be a public statement made by the Commissioner;
- invite voluntary disclosures about a scheme or transaction that applies to the entity's financial affairs; and
- include a date by which such voluntary disclosures are to be made.

When does the reduction to nil apply?

28. A reduction to nil under section 284-225 can only apply in relation to shortfall amounts. It does not apply in relation to scheme shortfall amounts.

29. The conditions that need to be satisfied for a penalty otherwise attracted to be reduced to nil are that the disclosure must:

(i) be made before the earlier of:

- the day the entity is informed by the Commissioner that a tax audit is to be conducted; or
- the day by which the Commissioner, in a public statement, requests the voluntary disclosure to be made;

(ii) be in the approved form;

(iii) be made voluntarily; and

(iv) disclose a shortfall amount of *less than* $1,000.

30. Where an entity makes more than one disclosure in respect of a particular accounting period or taxable importation, the disclosures should be added together to determine whether the $1,000 threshold has been exceeded for that period.

Example 1 – calculation of the $1,000 threshold

31. *Yuki makes a disclosure of a shortfall amount of income tax of less than $1,000 and an amended assessment is issued. Yuki then makes another disclosure of a shortfall amount of income tax in relation to the same accounting period so that the total shortfall amount disclosed for the period is equal to or more than $1,000.*

32. *As the total shortfall amount disclosed now exceeds $1,000, the penalty reduction provided in relation to the first disclosure would need to be revised.*

When does the 80% reduction apply?

33. The conditions that need to be satisfied for a penalty otherwise attracted to be reduced by 80% are that the disclosure must:

(i) be made before the earlier of:

- the day the entity is informed by the Commissioner that a tax audit is to be conducted; or
- the day by which the Commissioner, in a public statement, requests the voluntary disclosure to be made;

(ii) be in the approved form;

(iii) be made voluntarily; and

(iv) if it relates to a shortfall amount, disclose an amount of $1,000 or more.

When does the 20% reduction apply?

34. Notwithstanding that an entity has been told by the Commissioner that a tax audit will be conducted, the entity may still volunteer information to the Commissioner that will assist the completion of the tax audit. The penalty otherwise attracted in this situation will be reduced by 20% if the disclosure:

(i) is made after the entity has been informed by the Commissioner that a tax audit is to be conducted;

(ii) is made in the approved form;

(iii) is made voluntarily; and

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

35. The 20% reduction will apply where an entity makes a voluntary disclosure *after* being notified that a tax audit is to be conducted but *before* detailed enquiries are commenced into the matter disclosed and the disclosure enables a correct adjustment of the tax-related liability to be made. The timing and nature of the disclosure should be such that it can be reasonably estimated to have saved significant time or resources in the tax audit.

The Commissioner's discretion to treat a disclosure as having been made before the entity is informed of a tax audit

36. If an entity voluntarily tells (see paragraphs 54 to 76 of this draft Ruling regarding the meaning of 'voluntarily tells') the Commissioner about a shortfall amount or scheme shortfall amount *after* being notified that a tax audit is to be conducted the Commissioner may under subsection 284-225(5), if he considers it appropriate in all the circumstances, treat the disclosure as if it was made before the Commissioner informed the entity that the tax audit was to be conducted.

37. The effect of the exercise of the discretion is that the penalty otherwise attracted will be reduced by 80% (unless the disclosure relates to a shortfall amount that is less than $1,000, in which case the penalty is reduced to nil).

38. One of the purposes of the discretion is to ensure that an entity is not improperly denied the benefit of the 80% or full reduction in penalty because of a literal application of the law, such as the application of the broad meaning of the term 'tax audit'. The Commissioner's interpretation of what constitutes a 'tax audit' for the purposes of subsection 284-225(5) is outlined at paragraphs 49 to 51 of this draft Ruling. As the statutory definition is so broad, there may be some circumstances where it would be harsh not to allow the higher reduction.

39. Tax officers must consider each case based on all of the relevant facts and circumstances, having regard to the purpose of the provision. The overriding principles are that the discretion should be exercised where it is fair and reasonable to do so and must not be exercised arbitrarily.

40. As a general rule, the Commissioner's discretion will be exercised in the following circumstances:

(i) where the shortfall amount or scheme shortfall amount disclosed is not within the scope of the tax audit as notified to the entity;

(ii) where it may reasonably be concluded that the entity would have made the disclosure even if they had not been notified by the Commissioner of a tax audit (such as where a company is undertaking its own review of its tax affairs (often called 'a prudential audit') at the time the Commissioner notifies the entity of the tax audit and it could reasonably be concluded that the entity was going to disclose the outcome of its review irrespective of the tax audit);

(iii) where the entity makes a full disclosure before the formal date of commencement of the audit. However, the discretion should usually not be exercised in relation to disclosures made after the first interview (which may be via phone or in person); or

(iv) where the Commissioner is broadly identifying and assessing risks, for example a risk review.

41. However, the discretion should generally not be exercised where the facts or reasonable inferences indicate that the entity was aware of the shortfall amount or scheme shortfall amount prior to being told of the tax audit, and would not have made the disclosure if they had not been told of a tax audit (this includes where an entity intentionally disregards a taxation law).

42. In addition, the discretion would not usually be exercised where the entity has previously been provided a formal opportunity to make a voluntary disclosure.

43. Examples illustrating the above principles have been included in Appendix A of this draft Ruling.

Application of section 284-225 to taxable importations

44. Subsections 284-225(1) and 284-225(2) provide for a reduction in the base penalty amount for 'your shortfall amount or scheme shortfall amount, or for part of it, for an accounting period'. However, under item 1 of the table in subsection 284-80(1), a shortfall amount can also exist in relation to a taxable importation.

45. The question arises whether the words 'for an accounting period' limit the scope of shortfall amounts to which section 284-225 applies, or whether they serve merely to identify specifically a type of shortfall amount to which the provision applies. A taxable importation can clearly give rise to a shortfall amount in its own right in terms of subsection 284-80(1). In the Commissioner's view, the 'for an accounting period' reference in section 284-225 does not require the provision to be read down so as to exclude taxable importations.

46. It is clear from subsection 284-80(1) that the administrative penalty regime, including section 284-225, was intended to apply to taxable importations. This is also confirmed in the Revised Explanatory Memorandum to the A New Tax System (Tax Administration) Bill (No. 2) 2000 relating to the operation of section 284-225. Paragraph 1.123 of the Revised Explanatory Memorandum states that '[t]he base penalty amount imposed on a shortfall amount or a scheme shortfall amount will be reduced where the entity makes a voluntary disclosure of the shortfall amount or scheme shortfall amount'. The paragraph refers to shortfall amounts generally and does not qualify it by reference to 'for an accounting period'.

47. It is well settled that the object of statutory construction in every case is to ascertain legislative intent by reference to the language of the statute viewed as a whole. In doing so, one looks to 'the operation of the statute according to its terms and to legitimate aids to construction'.[8]

48. Therefore, reference to 'shortfall amount ..., or part of it, for an accounting period' in subsections 284-225(1) and 284-225(2) should be read as including a shortfall amount, or part of it, for a taxable importation. Similarly, where the shortfall amount or part of it relates to a taxable importation, reference in those subsections to the Commissioner telling the entity 'that a tax audit is to be conducted of [their] financial affairs for that period or a period that includes that period' should be read as including notification that a tax audit is to be conducted of their financial affairs for that taxable importation.

Commissioner's interpretation of important concepts

What is a 'tax audit'?

49. 'Tax audit' is defined as 'an examination by the Commissioner of an entity's financial affairs for the purposes of a taxation law'.[9] The definition is very broad, and covers not only audits the Commissioner undertakes to ascertain an entity's tax-related liability but *any* examination of an entity's financial affairs, including record-keeping audits, risk reviews, and verification checks. However, see paragraphs 36 to 42 and the examples included at Appendix A of this draft Ruling in relation to the Commissioner's discretion to treat a voluntary disclosure made by an entity after being notified of a tax audit as if it was made before the Commissioner informed the entity that the tax audit was to be conducted.

50. Section 284-225 refers to the entity being told of a tax audit in relation to an accounting period. It is the Commissioner's view that this section also applies in relation to taxable importations (see paragraphs 44 to 48 of this draft Ruling). As such, tax audits will only be relevant, for the purposes of section 284-225, where the notification of the tax audit includes the relevant accounting period(s) or taxable importation(s) being examined.

51. A tax audit regarding a tax-related liability, payment or credit that is unrelated to the shortfall amount, or part of it, that is voluntarily disclosed will be disregarded for the purposes of section 284-225, unless concurrent audits are being undertaken.

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[8] *Cooper Brookes (Wollongong) Pty. Limited v. Federal Commissioner of Taxation* (1981) 11 ATR 949 at 966; 81 ATC 4292 at 4305.
[9] Subsection 995-1(1) of the *Income Tax Assessment Act 1997* (ITAA 1997).

When will an entity be taken to have been told that a tax audit is to be conducted?

52. An entity will be treated as having been told that a tax audit is to be conducted when the Commissioner first makes contact with the entity or their representative about the tax audit. The notification of the tax audit may be made in writing or orally. The use of the word 'audit' is not necessary; terms such as 'under examination' or 'under review' would suffice.

53. As stated in paragraph 50 of this draft Ruling, a tax audit is only taken into account for the purposes of section 284-225 where the notification includes the accounting period(s) or taxable importation(s) under examination. While it will still be open for the Commissioner to look at other accounting periods or taxable importations, the entity will be able to make a disclosure about those other periods or taxable importations. Until such time as the entity is specifically told by the Commissioner that a tax audit will cover those accounting periods or taxable importations, the disclosure will be taken to have been made before being told of a tax audit and an 80% or full reduction in the penalty otherwise attracted will apply, provided that the disclosure is truly voluntary (see paragraphs 68 to 70 of this draft Ruling).

What is the meaning of 'voluntarily tell'?

54. This expression is not defined in the legislation and therefore takes its ordinary meaning. The word 'voluntary' is defined in the *Australian Oxford Dictionary*, 1999 Oxford University Press, Melbourne (The Australian Oxford Dictionary), as 'done, acting, or able to act of one's own free will; not constrained or compulsory, intentional'. It is seen as an act of admission done without prompting, persuasion or compulsion on the part of the Commissioner.

55. A disclosure will not be regarded as being made voluntarily where the facts or reasonable inferences indicate that the entity was aware of the shortfall amount or scheme shortfall amount, and would have been highly unlikely to have made the disclosure if the Commissioner was not about to uncover the shortfall amount or scheme shortfall amount (this includes where an entity intentionally disregards a taxation law).

Example 2 – disclosure not made voluntarily, intentional disregard

56. *Frank operated a legal escort business. The Australian Federal Police raided the premises from which the business was conducted and discovered the concealment of extensive amounts of cash. Tax officers also attended the raid. As a result, the Tax Office gained possession of the books of account which contained detailed records of the undeclared cash amounts.*

57. *After the raid, but before the Tax Office contacted Frank or his representative, Frank instructed his accountants to disclose the existence of the cash profits.*

58. *Although the disclosure was made prior to the Commissioner notifying Frank of a tax audit, the facts indicate that Frank was well aware that the Commissioner was about to uncover the shortfall amount, and it is reasonable to infer that he would not otherwise have made the disclosure. As such, the disclosure is not considered to have been made voluntarily.*

Example 3 – disclosure made voluntarily despite intentional disregard

59. *Julie, the Chief Executive Officer for Mathanta Pty Ltd, discovers that Kathy, the company's tax manager, claimed significant input tax credits for the company in relation to the quarterly tax period ending 30 September 2007, for acquisitions that were never made. The company immediately discloses the resulting shortfall amount to the Commissioner. The Commissioner had not commenced any investigations into the affairs of the company.*

60. *Although the shortfall amount was caused by an intentional disregard of the law by an employee of Mathanta Pty Ltd, it is clear from the facts that the company has nevertheless disclosed the shortfall amount of its own volition. As such, the disclosure will be regarded as having been made voluntarily.*

61. The word 'tell' is also not defined in the legislation and therefore also takes its ordinary meaning. The Australian Oxford Dictionary defines 'tell' to mean 'to make known; express in words; divulge'. Accordingly, in order for an entity to receive a reduction in penalty under section 284-225 they must actually make a disclosure. Merely providing requested documents to the Commissioner or answering questions is not sufficient.

62. In order to qualify for a reduction in penalty under section 284-225, the entity must make, voluntarily, disclosures of information not otherwise known to the Commissioner. As such, where the Commissioner has already identified that there is a shortfall amount or a scheme shortfall amount and contacts the entity regarding that shortfall amount or scheme shortfall amount, the entity can not be said to be making a voluntary disclosure where they merely agree with what the Commissioner has already identified.

Example 4 – no disclosure where the Commissioner has already identified a shortfall amount

63. *The Tax Office conducts a routine data-matching exercise in relation to interest income. Raj is identified as having omitted $3,000 of income from her 2007 income tax return. The Commissioner informs Raj of the omitted interest and the commencement of an audit in relation to the 2007 income year. Raj confirms the Tax Office findings.*

64. *The confirmation by Raj of the Tax Office findings does not qualify for a reduction in penalty as she is merely confirming what the Commissioner has already identified.*

65. The expression 'voluntarily tell' is used in subsections 284-225(1), 284-225(2) and 284-225(5), and its meaning must be read in the context in which it appears. There are subtle differences in the meaning of 'voluntarily tell' in each of these subsections.

'Voluntarily tell' under subsection 284-225(2)

66. In the context of subsection 284-225(2), following from the dictionary definition above, it is the Commissioner's view that 'voluntarily tell' means an unprompted disclosure in the sense that the disclosure is made before the earlier of direct contact with the entity or the entity's representative by the Commissioner (in relation to the particular tax-related liability and accounting period, or the particular taxable importation, to which the disclosure relates), or before the date mentioned in a relevant public statement made by the Commissioner.

67. A disclosure about a shortfall amount or scheme shortfall amount in relation to one type of tax-related liability will usually be voluntarily made even though it is made after the notification of a tax audit in relation to another tax-related liability. For example, if an entity is notified by the Commissioner of a GST audit, and a disclosure is made about a shortfall amount of income tax, that disclosure will be treated as being made voluntarily unless the entity has been advised that concurrent audits of both taxes are being undertaken or paragraph 55 of this draft Ruling applies.

68. Similarly, disclosures about shortfall amounts or scheme shortfall amounts relating to an accounting period or taxable importation not under audit will be accepted as having been made voluntarily, unless paragraph 55 of this draft Ruling applies.

Example 5 – circumstances that indicate a disclosure outside the period under tax audit was not made voluntarily

69. *The Commissioner is conducting a tax audit in relation to Benton's GST liability for the quarterly tax period ending 31 March 2006. The tax officer has discussions with Benton indicating that the audit will be extended to cover his GST liability for the quarterly period ending 30 June 2006. However, formal notification of the commencement of a tax audit for that accounting period had not yet been given. Benton subsequently discloses a shortfall amount of GST for the quarter ending 30 June 2006.*

70. *As Benton had not yet received notification that a tax audit was going to be conducted in relation to the quarter ending 30 June 2006, it falls for consideration under subsection 284-225(2). However, because Benton was aware that the tax audit was being extended to the accounting period and the subject matter to which the disclosure relates, the disclosure would not be regarded as being made voluntarily.*

71. An entity will not be precluded from making a voluntary disclosure under subsection 284-225(2) merely because:

- there is a Tax Office project or review being conducted on an industry-wide or geographic basis and the entity is engaged in that industry or lives in the relevant geographic area;
- the entity's name is listed by the Tax Office for future audit; or
- particular compliance activities are listed in the Tax Office's annual Compliance Program.

'Voluntarily tell' under subsections 284-225(1) and 284-225(5)

72. In the context of subsections 284-225(1) and 284-225(5), voluntarily tell takes on a subtly different meaning from that in subsection 284-225(2) because direct contact has been made by the Commissioner. However, the general principle outlined in paragraph 55 of this draft Ruling still applies.

73. A voluntary disclosure in this sense assumes 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. The taxpayers' charter booklet *If you're subject to enquiry or audit* outlines what is ordinarily expected of an entity during the conduct of a tax audit.

74. However, merely providing cooperation and assistance during the conduct of a tax audit does not of itself constitute a voluntary disclosure. As mentioned in paragraph 61 of this draft Ruling, the entity must in fact make a disclosure about a shortfall amount or scheme shortfall amount in order to be entitled to a reduction in penalty.

75. The requirement that the disclosure be made voluntarily is closely related to the requirement that the disclosure can reasonably be estimated to have saved the Commissioner a significant amount of time or significant resources in the tax audit.

76. A disclosure will also have been made voluntarily where it relates to a matter that is outside the scope of the tax audit.

What is 'a significant amount of time or significant resources' for the purposes of subsection 284-225(1)?

77. Subsection 284-225(1) requires not only that the entity voluntarily tell the Commissioner about a shortfall amount or scheme shortfall amount, but also that this disclosure can reasonably be estimated to have saved the Commissioner a significant amount of time or significant resources. This is an objective test.

78. A disclosure made early during an audit is more likely to result in a significant saving of time or resources than a disclosure made later, especially where the disclosure relates to a matter that will clearly be examined during the course of the tax audit. It should be noted that the actual time and resources spent on the tax 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 into looking into the matter disclosed.

79. The reduced rates of penalty for disclosures made after notification of an audit are not attracted where the entity is simply courteous or co-operative in responding to specific requests for information. To attract the reduced rates the entity must make, voluntarily, disclosures of information not otherwise known to the Commissioner that could reasonably be expected to lead to a significant saving in time or resources.

Principles regarding the making of a voluntary disclosure

80. Unlike the former provisions under Part VII of the ITAA 1936, there is no statutory requirement that voluntary disclosures be given to the Commissioner in writing. Rather, the disclosure must be made in the approved form.

81. An entity may make a disclosure about one part of a shortfall amount or scheme shortfall amount but not other parts of a shortfall amount or scheme shortfall amount. This may be because the entity is only aware of part of the shortfall amount or scheme shortfall amount. Provided the disclosure of that particular part meets the requirements of section 284-225, the entity will be entitled to the reduced penalty rates on the part of the shortfall amount or scheme shortfall amount disclosed. The part or parts of the shortfall amount or scheme shortfall amount not disclosed will not receive any reduction in penalty.

82. The entity need not admit liability in respect of the shortfall amount or scheme shortfall amount disclosed. The entity is eligible for the reduced penalty rates whether or not the entity maintains an opinion contrary to that of the Commissioner or disputes the adjustment made by the Commissioner to the entity's tax-related liability.

Application of section 284-225 where an entity applies for a private ruling

83. Entities or their representatives can apply for a private ruling on the Commissioner's opinion about the way in which the law applies or would apply in their particular circumstances.[10]

[10] See Division 359, and sections 105-60 and 356-5 in relation to private indirect tax rulings.

84. Where an entity or their representative lodges an application for a private ruling, which:

- the Commissioner must deal with; and
- is not prompted by Tax Office action, either through the notification of a tax audit or the issue of a public statement inviting voluntary disclosures,

the application will usually be considered a voluntary disclosure, subject to the considerations in this Ruling about whether it is made voluntarily and the time at which it is made.

Application of section 284-225 in 'self amendment' cases

85. The Commissioner may accept statements made by entities in amendment requests for the purposes of making an assessment.[11] In relation to some taxes (for example GST), an entity may also make amendment requests by revising their previously lodged returns or activity statements. A 'self amendment' is any request for an amendment where the Commissioner accepts the statements without scrutiny. It includes the revision of returns or activity statements by entities themselves.

86. A request for amendment, including a 'self amendment', which is not prompted by Tax Office action, either through the notification of a tax audit or the issue of a public statement inviting voluntary disclosures, will usually be considered a voluntary disclosure, subject to the considerations in this Ruling about whether it is made voluntarily and the time at which it is made.

Definitions

Approved form

87. Subsection 995-1(1) of the ITAA 1997 defines 'approved form' as having the meaning given by section 388-50.

88. Section 388-50 provides that a return, notice, statement, application or other document under a taxation law is in the approved form if, and only if:

- it is in the form approved in writing for the Commissioner for that kind of return, notice, statement, application or other document;
- it contains a declaration signed[12] by a person or persons as the form requires;

[11] For example, subsection 169A(1) of the ITAA 1936.
[12] A signature includes an electronic or telephone signature if the document is being lodged electronically or by telephone respectively (see section 388-75).

- it contains the information that the form requires, and any further information, statement or document as the Commissioner requires, whether in the form or otherwise; and
- for a return, notice, statement, application or document that is required to be given to the Commissioner – it is given in the manner that the Commissioner requires.

Base penalty amount

89. In the context of Division 284, subsection 995-1(1) of the ITAA 1997 states that the base penalty amount for calculating the amount of an administrative penalty is worked out under:

- section 284-90, where the penalty is for a false or misleading statement, or a position that is not reasonably arguable, and
- section 284-160, where the penalty relates to a scheme.

90. The base penalty amount is the starting point for the calculation of an administrative penalty.

Scheme

91. 'Scheme' is very widely defined in subsection 995-1(1) of the ITAA 1997. It means any arrangement, scheme, plan, proposal, action, course of action or course of conduct, whether unilateral or otherwise.

92. An arrangement is further defined in subsection 995-1(1) of the ITAA 1997 as any arrangement, agreement, understanding, promise or undertaking, whether express or implied, and whether or not enforceable (or intended to be enforceable) by legal proceedings.

Scheme shortfall amount

93. 'Scheme shortfall amount' is defined in subsection 995-1(1) of the ITAA 1997 as having the meaning given by section 284-150.

94. Section 284-150 provides that a scheme shortfall amount is the amount of the scheme benefit that you would, apart from the adjustment provision, have got from the scheme.

Shortfall amount

95. 'Shortfall amount' is defined in subsection 995-1(1) of the ITAA 1997 as having the meaning given by section 284-80.

96. Section 284-80 provides that a shortfall amount is the amount by which the relevant tax-related liability, or the payment or credit, is less than or more than it would otherwise have been.

Taxation law

97. 'Taxation law' is defined in subsection 2(1) of the TAA as having the meaning given by the ITAA 1997. Subsection 995-1(1) of the ITAA 1997 defines 'taxation law' as an Act of which the Commissioner has the general administration and any regulations under such an Act. It also includes part of an Act (and associated regulations) to the extent that the Commissioner has the general administration of the Act.

98. However, subsection 2(2) of the TAA provides that an Excise Act (as defined in subsection 4(1) of the *Excise Act 1901*) is not a taxation law for the purposes of subdivision 284-B (administrative penalties relating to statements).

Tax audit

99. 'Tax audit' is defined in subsection 995-1(1) of the ITAA 1997 to mean an examination by the Commissioner of an entity's financial affairs for the purposes of a taxation law.

Tax-related liability

100. 'Tax-related liability' is defined in subsection 995-1(1) of the ITAA 1997 as having the meaning given by section 255-1.

101. Section 255-1 provides that a tax-related liability is a pecuniary liability to the Commonwealth arising directly under a taxation law (including a liability the amount of which is not yet due and payable).

Commissioner of Taxation
14 May 2008

Appendix A – Examples relating to the Commissioner's discretion in subsection 284-225(5)

This Appendix sets out examples. It does not form part of the proposed binding public ruling.

102. The operation of subsection 284-225(5) depends heavily on the facts of each case. The Examples which follow are not designed to fetter the exercise of the Commissioner's discretion, but are for illustrative purposes only. They have been simplified to illustrate various aspects of the Commissioner's discretion under the subsection, and frequently use shortcuts in describing whether or not conditions for exercise of the discretion are met.

103. The examples are not intended to prescribe the level of information required to properly determine whether or not the discretion should be exercised. In practice, a higher level of detail would need to be examined to reach a conclusion on whether it is appropriate for the Commissioner to exercise his discretion. For this reason it would not be appropriate to make any of the Examples part of the proposed binding public ruling.

Example 6 – exercise of the Commissioner's discretion where the disclosure relates to a matter outside the scope of the tax audit[13]

104. John, a sole trader, was advised that a record-keeping review was going to be conducted in relation to his business records for the 2006 income year to ensure that they complied with the relevant legislative requirements.

105. When the Tax Office auditor arrived to conduct the review, John provided a written statement that a capital expense had been incorrectly claimed as a repair in his 2006 income tax return.

106. While the disclosure was made voluntarily after John had been notified of the record-keeping review, the auditor determines that it would be unlikely that the shortfall amount would have been detected by the record-keeping review. As such, the Commissioner would exercise his discretion under subsection 284-225(5) to treat the disclosure as having been made before the notification of the tax audit.

[13] Refer to subparagraph 40(i) of this draft Ruling.

Example 7 – exercise of the Commissioner's discretion where the disclosure relates to a matter outside the scope of the audit[14]

107. Jimback Pty Ltd, the head company of a consolidated group, was advised that a tax audit was going to be conducted of the consolidated group's income tax liability for the 2007 income year in relation to particular transactions made by Spatiro Pty Ltd and Gangupp Pty Ltd, subsidiary members of the consolidated group. Dankesehr Pty Ltd, another subsidiary member of the group, disclosed an error they had made which impacted on the consolidated group's income tax liability for the 2007 income year and it is unlikely that the error would have been detected during the tax audit.

108. The disclosure made would be considered to be outside the scope of the tax audit notified to the head entity, as the notification of the audit indicated that the transactions of Spatiro Pty Ltd and Gangupp Pty Ltd were the focus of the audit. As the disclosure was also made voluntarily and it was unlikely the error would have been discovered during the tax audit, it would be appropriate for the Commissioner to exercise his discretion under subsection 284-225(5) to treat the disclosure as having been made before the notification of the tax audit.

Example 8 – exercise of the discretion where the entity is undertaking a prudential audit[15]

109. Merry Will Pty Ltd was notified in January 2007 that the Commissioner intended to conduct an audit of their income tax return for the 2005 income year. The company immediately wrote to the Commissioner advising that in November 2006 it had contracted with an accounting firm to conduct a prudential audit of its 2005 return, as part of its tax risk management strategy. Documents held by the company confirm this information. In February 2007 the company made a disclosure of an error in their 2005 return.

110. The company has a good compliance history and has previously made voluntary disclosures in respect of other returns.

111. Although the disclosures were made after the entity had been informed of the tax audit, the evidence suggests that the disclosures would have been made even if the company had not received notification of a tax audit. The evidence also indicates that the disclosures could be regarded as being made voluntarily. Accordingly, the Commissioner would exercise his discretion under subsection 284-225(5) to treat the disclosure as having been made before the entity was informed of the tax audit.

[14] Refer to subparagraph 40(i) of this draft Ruling.
[15] Refer to subparagraph 40(ii) of this draft Ruling.

Example 9 – exercise of the discretion where the Commissioner is broadly identifying and assessing risks[16]

112. Weasley Pty Ltd was advised that a risk review was going to be conducted in relation to their 2006 FBT year. At the time of this notification the Commissioner had not focussed his attention on any specific risks.

113. During the risk review, Weasley Pty Ltd identifies and discloses that several payments made to employees as a reimbursement of expenses were omitted from its 2006 FBT return. The Commissioner considers that the disclosure was made voluntarily.

114. As the Commissioner is examining the company's financial affairs, the risk review is regarded as being a 'tax audit'. The disclosure has therefore been made after the notification of the tax audit. However, as the Commissioner has not yet focussed his examination on the specific issue to which the disclosure relates, it is appropriate for the Commissioner to exercise his discretion to treat the disclosure as having been made before the notification of the tax audit.

Example 10 – no exercise of discretion where previous opportunity to make a voluntary disclosure during a risk review, exercise of discretion where subsequent voluntary disclosure outside scope of formal audit[17]

115. Aldaraan Enterprises Pty Ltd was advised that a transfer pricing risk review was going to be conducted in relation to the 2006-07 income year. The company did not make any disclosures during the conduct of this risk review.

116. At the conclusion of the risk review, Aldaraan Enterprises Pty Ltd is advised that a formal transfer pricing audit is going to be conducted in respect of that year. At that point, the company discloses a shortfall amount relating to transfer pricing issues.

117. In these circumstances, the Commissioner would not exercise his discretion to treat the disclosure as being made before the notification of the tax audit, as the company had previously been given a formal opportunity to make a voluntary disclosure during the risk review.

118. During the course of the formal transfer pricing audit Aldaraan Enterprises Pty Ltd discloses a shortfall amount in respect of claims for research and development expenditure which have no connection with the transfer pricing issues.

119. The Commissioner would exercise his discretion under subsection 284-225(5) to treat the disclosure as having been made before the notification of the tax audit since the disclosure was considered to be outside the scope of the transfer pricing audit.

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[16] Refer to subparagraph 40(iv) of this draft Ruling.
[17] Refer to paragraph 42 of this draft Ruling.

Example 11 – no exercise of discretion where previous opportunity to make a voluntary disclosure through a public statement[18]

120. The Commissioner makes a public statement in relation to investment income from offshore bank accounts. The public statement invites entities to make voluntary disclosures about such investments by 30 June 2007.

121. Jamaya has investments in offshore bank accounts and has not included the income from those accounts in his income tax returns. He does not make a voluntary disclosure before 30 June 2007.

122. On 6 August 2007 he receives a letter from the Commissioner notifying him that an audit in relation to his offshore income is to be conducted for the 2006 income year. Before the formal date of commencement of the audit, he discloses his undeclared offshore income which results in a shortfall amount.

123. As Jamaya had previously been given a formal opportunity to make a voluntary disclosure when the Commissioner made his public statement, the Commissioner would not exercise his discretion to treat the disclosure as having been made before the notification of the tax audit.

[18] Refer to paragraph 42 of this draft Ruling.

Your comments

124. We invite you to comment on this draft Miscellaneous Taxation Ruling. Please forward your comments to the contact officer by the due date. (Note: the Tax Office prepares a compendium of comments for the consideration of the relevant Rulings Panel. The Tax Office may use a sanitised version (names and identifying information removed) of the compendium in providing its responses to persons providing comments. Please advise if you do not want your comments included in a sanitised compendium.)

Due date:	**27 June 2008**
Contact officer:	**Laurren Pamenter**
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Detailed contents list

125. Below is a detailed contents list for this draft Ruling:

References

Previous draft:

Not previously issued as a draft

Related Rulings/Determinations:

TR 94/3; TR 2006/10; MT 2008/D1; MT 2008/D2

Previous Rulings/Determinations:

TR 94/6

Subject references:

- administrative penalty
- taxpayer disclosures
- voluntary disclosures

Legislative references:

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- ANTS(GST)A 1999 Div 168
- ITAA 1936 160ARZJ
- ITAA 1936 160ARZK
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- ITAA 1936 169A(1)
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- ITAA 1936 226D
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- ITAA 1936 226F
- ITAA 1936 226Y
- ITAA 1936 226Z
- ITAA 1936 226ZA
- ITAA 1997 995-1(1)
- TAA 1953 2(1)
- TAA 1953 2(2)
- TAA 1953 Sch 1 105-60
- TAA 1953 Sch 1 255-1
- TAA 1953 Sch 1 Pt 4-25
- TAA 1953 Sch 1 Div 284
- TAA 1953 Sch 1 Subdiv 284-B
- TAA 1953 Sch 1 284-75(1)
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- TAA 1953 Sch 1 284-75(3)
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- TAA 1953 Sch 1 284-85
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- TAA 1953 Sch 1 284-150
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- TAA 1953 Sch 1 284-160
- TAA 1953 Sch 1 284-220
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- TAA 1953 Sch 1 284-225(3)
- TAA 1953 Sch 1 284-225(4)
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Case references:

- Cooper Brookes (Wollongong) Pty. Limited v. Federal Commissioner of Taxation 81 ATC 4292; 11 ATR 949; 147 CLR 297

Other references:

- Australian Oxford Dictionary, 1999, Oxford University Press, Melbourne
- Law Administration Practice Statement PS LA 2006/2
- Revised Explanatory Memorandum to the A New Tax System (Tax Administration) Bill (No. 2) 2000
- Taxpayers' charter booklet *If you're subject to enquiry or audit*
- www.ato.gov.au

ATO references

NO: 2007/4550
ISSN: 1039-0731
ATOIaw topic: Income Tax ~~ Administration ~~ penalty tax and general interest charge

Appendix B – Flow chart on the operation of subsections 284-225(1)-(4)