IT 2616 - Income tax: self-assessment - questions concerning taxpayers liability to tax - subsection 169A(2) requests

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TAXATION RULING NO. IT 2616

INCOME TAX: SELF-ASSESSMENT - QUESTIONS CONCERNING TAXPAYERS LIABILITY TO TAX - SUBSECTION 169A(2) REQUESTS.

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I 1012399	SELF-ASSESSMENT QUESTIONS CONCERNING TAXPAYERS LIABILITY TO TAX	169A(2) 170AA 223

OTHER RULINGS ON THIS TOPIC: IT 2444, IT 2500, IT 2517, IT 2593

PREAMBLE

Subsection 169A(2) of the Income Tax Assessment Act 1936 (the Act) provides that where, in a document furnished in a return of income of a taxpayer of a year of income and signed by or on behalf of the taxpayer, a question is raised that is relevant to the liability of the taxpayer to tax in respect of the year of income, the Commissioner shall give attention to that question.

2. The purpose of this Ruling is to provide administrative guidelines in relation to questions raised by taxpayers under subsection 169A(2) concerning their liability to tax.

3. Subsection 169A(2) was inserted into the Act in 1986 as part of the measures that facilitate the system of self-assessment of income tax returns. As described in Taxation Ruling IT 2444, under the self-assessment system income tax returns are not generally subject to technical scrutiny before an assessment is made. Some clerical examination does occur but this is mainly to prepare returns for computer processing and to identify obvious errors and incorrect claims. Under the self-assessment system the Commissioner ordinarily makes an assessment based on acceptance of the information contained in the income tax return lodged by the taxpayer.

4. The issue of a notice of assessment does not mean, therefore, that every aspect of the law relevant to the taxpayer's liability to tax has been considered. In particular, taxpayers cannot assume that an assessment based on the taxable income disclosed in the tax return means that the Commissioner agrees with all of the items contained therein e.g., claims for deductions, explanations concerning exempt income, etc. If such claims were made on the basis of an incorrect understanding of the law or misapplication of the law to the particular fact situation, such errors would

ordinarily be identified only at the post-assessment audit or examination stage.

5. Prior to the introduction of self-assessment, section 170 of the Act provided that where there had been a full and true disclosure in a return of income, the Commissioner, generally speaking, could only amend an assessment to correct an error in calculation or a mistake of fact. It was not possible for the Commissioner to amend an assessment to correct an error of law. For self-assessment to work it was necessary to amend section 170 to grant the Commissioner power to amend an assessment to correct errors of law detected after the assessment process is completed. This is now able to be done within the same specified time limits that apply in respect of amendments made to correct errors of calculation and mistakes of fact.

6. A result of the self-assessment process is that a taxpayer cannot be certain that the amount of tax payable in respect of a particular year will not be altered because the Commissioner subsequently forms the view that the taxpayer has, in some particular, misunderstood or misapplied the law. As a means of providing a greater degree of certainty for taxpayers in the self-assessment environment, subsection 169A(2) provides an opportunity for taxpayers who are uncertain about a question which affects their tax liability for the particular year to include such a question in a document furnished with their return.

RULING

7. Some aspects of subsection 169A(2) requests have been dealt with in Taxation Rulings IT 2444 and IT 2500. Paragraph 18 of IT 2500 indicates that ideally, the document containing the request should be prominently placed in the taxpayer's return using separate pages. Requests for the Commissioner's views should be clearly identified as such and all return forms in which a request is contained should have the word "yes" inserted in the request for rulings block on page 1 of the form.

8. The Commissioner will normally consider himself bound by any concluded view expressed in response to a subsection 169A(2) request. It is imperative therefore when framing a request, that sufficient details are provided to enable the Commissioner to express a well-informed view on the question raised. Provided sufficient details have been given, that view will only be departed from in circumstances similar to those set down in IT 2500 for Taxation Rulings and Advance Opinions.

9. It is a matter of judgment in each case as to how much information should be provided. Most requests can be categorised as either a question concerning the application of well-established principles of law to a particular fact situation, or a question where there is uncertainty as to the correct legal principles to be applied. In each case a full description of the relevant facts should be provided. The sort of information required includes the details of any transactions entered into that are relevant to the question raised, the purpose of those transactions, the name, address and relationship of all parties to those transactions and all documents relevant to the transactions. Any legal opinions

obtained in respect of the question may also be included as well as the results of any research that may have been undertaken by the taxpayer or tax agent.

10. It is the Commissioner's policy to respond in writing to each request made under subsection 169A(2). If an issue is able to be resolved by telephoning the taxpayer or agent this will ordinarily be done and a written acknowledgement of the conversation will be sent in every case. In most cases it is possible to express a concluded view on the question raised without unduly delaying the taxpayer's assessment for the relevant year. If insufficient information has been provided this should be sought, if possible by telephone, but otherwise by writing to the taxpayer. If a genuine attempt has been made at the time of making the request to include sufficient information to enable the request to be properly considered, every effort should be made prior to assessment to obtain whatever extra information is necessary to decide the question raised so that the matter can be resolved before assessment.

11. Where the taxpayer is a company or trustee of an approved deposit fund, superannuation fund or pooled superannuation trust (i.e., a"relevant entity" as defined in subsection 221AK(1) of the Act) and furnishes a return of income, the Commissioner is deemed by section 166A to have made an assessment in relation to the entity on the date the final payment is due or the date the return is furnished, whichever is the later. The return is deemed to be a notice of the deemed assessment. In cases where the deemed assessment is made on the date the return is furnished, attention can only be given to a subsection 169A(2) request after assessment. Any further details that may be required in relation to the request can, necessarily, only be provided after that time. (Taxation Ruling IT 2593 deals at length with the question of company self-assessment and requests for advice by relevant entities).

12. For taxpayers other than relevant entities where, in all the circumstances of the case, it is clear that there has been no real attempt to provide sufficient details to enable worthwhile consideration to be given to the question asked, further information should be invited at the time the notice of assessment issues. The taxpayer should be informed that the absence of sufficient information has prevented the formation of a concluded view of the matter and the assessment raised is based on the information contained in the return of income as lodged and the amount of taxable income disclosed therein.

13. It may be, of course, that a question raised is too complex to be conclusively dealt with in the time available prior to assessment. In these cases a written explanation of the position will accompany the notice of assessment informing the taxpayer that consideration is being given to the question and a concluded view will be forthcoming as soon as is practicable.

14. If a request has been made under subsection 169A(2) in a particular year and a notice of assessment issues without an accompanying advice concerning the request, the taxpayer would be entitled to assume that the request was overlooked in the assessment

process, and to take the matter up with the Tax Office which issued the notice of assessment.

15. A number of specific matters have arisen regarding subsection 169A(2) requests that require uniform administrative procedures to be put in place. All Branch Offices should treat the following cases in the manner described so that consistent administrative practice is achieved.

Losses

16. Where a taxpayer has carry-forward losses, is non-taxable in the particular year in which the subsection 169A(2) request is made and will remain so notwithstanding the determination of that request, the request should be treated like any other and given appropriate consideration. The question will affect the taxpayer's liability to tax in a future year and it is better to have the matter determined as soon as possible after the relevant event has occurred. Similarly, questions raised by a group company that affect the amount of transferable losses under section 80G of the Act should also be resolved as soon as practicable so that ascertainment of a transferee company's liability to tax is not unduly delayed.

Tax Shelters

17. Appropriate consideration cannot be given to subsection 169A(2) requests in relation to tax shelters which do not contain the kind of information described in paragraph 9 above. In cases where the information is not provided the taxpayer should be notified when the notice of assessment issues that insufficient details have been provided to enable a concluded view to be expressed and that the assessment has been raised on the basis of the information contained in the return. The taxpayer should be invited to provide all relevant information of the kind described in paragraph 9 above (including any "prospectus" type documents in relation to the activity) and informed that the matter will receive further attention upon receipt of that information.

General Questions

18. Cases have been encountered involving requests that the Commissioner confirm "that all deductions claimed are allowable" or other such broad requests unaccompanied by details sufficient to focus attention on a particular question. Again, in these kinds of cases the taxpayer should be informed at the time a notice of assessment issues that insufficient detail has been given and the assessment is based on the information contained in the return. The taxpayer should be invited to provide information in relation to the particular matter of concern and informed that full consideration will be given to the question raised upon receipt of that information.

Quantum and Apportionment

19. In other cases minimum, but sufficient, information is supplied. For example, requests have been made in the following terms on behalf of taxpayers:

> 'The taxpayer is a motor mechanic who is required to supply his own overalls - please confirm the amount of $100 is an allowable deduction for replacement of overalls'.

In such cases a general response should be given which accepts the facts as disclosed and briefly sets out the basic tests for deductibility of the claim made. Such a response could say that a taxpayer who is required to supply his own protective clothing in the performance of his employment duties is generally entitled to a deduction for the cost of that clothing. On the basis of the information provided the taxpayer is entitled to the deduction claimed.

20. It should be noted that this form of response assumes that the taxpayer has supplied his own overalls and that $100 has, in fact, been expended. In these kinds of cases such assumptions can fairly be made without undue concern.

21. A variation of the abovementioned kind of situation occurs in cases where, for example, a request is made along the following lines:

> 'The taxpayer uses his home telephone for business purposes. He estimates that 50% of his total telephone expenses are therefore tax deductible. Please confirm that the amount claimed is allowable.'

To confirm the claim requires an acceptance that the deduction is, in principle, allowable and that the apportionment between business and private usage is correct. Depending on the occupation of the taxpayer it is possible to accept that the deduction is allowable in principle. However, on the basis of the information provided, a positive response cannot be given on the question of apportionment of the expense. In these kinds of cases the assessment should be based on the amount claimed as a deduction and an advice should issue with the notice of assessment explaining why the question raised cannot be completely answered. The taxpayer should also be invited to provide more information regarding the issue if he or she wishes further attention to be given to the question raised.

Valuation

22. Cases have also arisen involving valuation questions for capital gains tax purposes. An example of this kind of request is:

> 'The taxpayer has acquired an asset from a non-arms' length party for $5,000. The market value of the asset is estimated to be $10,000. The deemed cost base for CGT purposes is the market value of the asset at the time of acquisition. Please confirm that $10,000 is the cost base of the asset.'

Acceptance or otherwise of any valuation regarding the market value of an asset is ordinarily a consideration more appropriately undertaken at the time an assessment is made. The response to the taxpayer's request should reflect this view. It would be appropriate however to advise the taxpayer that an independent

valuer's written valuation ought to be obtained for the purposes of calculating any future capital gain or capital loss in the event of the subsequent disposal of the asset.

Further Information

23. In all cases where taxpayers are invited to provide more information in regard to requests made under subsection 169A(2), taxpayers should be asked to provide the information within 21 days to avoid undue delay in finalising the request.

Successive Requests

24. A question raised may concern an issue that affects a taxpayer's liability to taxation in successive years of income. As a consequence, some taxpayers have included identical subsection 169A(2) requests in successive returns for the years of income during which the question is relevant. Provided all relevant facts have been included in the initial request and there have been no material changes that affect the taxpayer's situation, it is unnecessary to lodge more than one request in relation to an issue.

Penalties

25. Section 223 imposes additional tax where a taxpayer makes a statement (including an oral statement) to a taxation officer, or to another person for a purpose in connection with the operation of the Act or regulations, that is false or misleading in a material particular, or omits something so as to make the statement misleading in a material particular and, in the result, there is or would have been avoidance of tax.

26. The scope and operation of section 223 is not affected by the process of self-assessment. Section 223 will apply in appropriate cases notwithstanding the fact that the offending statement or statements are made in the context of a subsection 169A(2) request. Information supplied by a taxpayer either orally or in writing in response to an invitation to provide more information regarding a question raised under subsection 169A(2) is taken to form part of the request. Guidelines regarding remission of section 223 additional tax are set out in Taxation Ruling IT 2517.

Section 170AA Interest

27. IT 2444 discusses the general scope and operation of section 170AA. The section was inserted into the Act as part of the self-assessment provisions to provide for the payment of interest by a taxpayer where an assessment is amended to correct an error which resulted in underpayment of tax. The section does not operate where the underpayment of tax is subject to additional tax under section 223. Subsection 170AA(11) vests in the Commissioner a discretion to remit the whole or any part of the interest payable under section 170AA. The question arises as to what effect, if any, the inclusion of a request under subsection 169A(2) ought to have on the exercise of the discretion where, upon determination of the matter raised, there has been an underpayment of tax. The matter was raised in paragraph 22 of IT 2444 and the following remarks explain in more

detail what was therein stated. Nothing in the following paragraphs is intended to restrict Deputy Commissioners and authorising officers in the exercise of their discretion to remit the interest charge.

28. The following paragraphs do not relate to companies or trustees that are relevant entities. As stated in paragraph 11 above, IT 2593 discusses requests for advice by relevant entities including the question of the application of section 170AA.

29. The simple fact that the matter giving rise to the underpayment of the tax was raised in the context of subsection 169A(2) will not, of itself, be sufficient to remit any interest payable. If this were not so, subsection 169A(2) could be used as a tool to delay payment of tax with impunity.

30. In some cases attention cannot be given to a subsection 169A(2) request prior to assessment but sufficient details have been provided that otherwise would have enabled determination of the question to be made at the time the assessment was made. In cases of this kind where underpayment of tax occurs, interest may be remitted in full provided the question raised is not frivolous or had not been ruled on previously by the Commissioner, in response to a prior subsection 169A(2) request or Advance Opinion request, in a way that differs from the position adopted subsequently by the taxpayer. A frivolous question is one, for example, where the answer to the issue raised is free of doubt having regard to the relevant facts and law.

31. In all other cases the question of remitting interest will depend on a number of factors including, but not limited to, the kind of question raised, the amount of information provided, the difficulty of the question raised, whether the return is agent prepared, whether there is judicial or quasi-judicial support for the position adopted by the taxpayer and where, by reason of the particular circumstances of the case it is considered fair and reasonable to remit the interest.

COMMISSIONER OF TAXATION
25 October 1990