MT 2008/3 - Shortfall penalties: voluntary disclosures

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Miscellaneous Taxation Ruling

Shortfall penalties: voluntary disclosures

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This publication provides you with the following level of protection:

This Ruling (excluding appendixes) is a public ruling for the purposes of section 105-60 of Schedule 1 to the *Taxation Administration Act 1953* (TAA). This Ruling (excluding appendixes) is also a public ruling for the purposes of Division 358 of Schedule 1 to the TAA.

If a statement in this ruling is later found to be incorrect or misleading and you make a mistake as a result of relying on this ruling, you will not have to pay any resulting underpaid tax nor will you have to pay any penalty. In addition, if you have relied on this ruling reasonably and in good faith you will not have to pay interest charges.

What this Ruling is about

1. This Ruling outlines the Commissioner's interpretation of section 284-225 of Schedule 1 to the 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 assist tax officers in determining when the discretion should be exercised 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 consider the application of section 284-225 of Schedule 1 to the TAA to shortfall amounts relating to the tourist refund scheme under Division 168 of the *A New Tax System (Goods and Services Tax) Act 1999* (GST Act) or Division 25 of the *A New Tax System (Wine Equalisation Tax) Act 1999*.

5. 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, which contains guidelines for the remission of administrative penalty imposed under subsection 284-75(1) of Schedule 1 to the TAA.

6. 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).

7. This Ruling does not deal with whether or not an entity will be prosecuted where they have made a voluntary disclosure. Such decisions are made by the Director of Public Prosecutions (DPP). Referrals to the DPP will be made in accordance with the Tax Office's prosecution policy.[1]

8. The approved form for voluntary disclosures can be found under the Forms section on the Tax Office website.[2]

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

10. A number of expressions used in the relevant legislative provisions are referred to in this Ruling. These expressions are defined in paragraphs 97 to 115 of this Ruling.

[1] A hyperlink to the Tax Office's prosecution policy is provided in the 'Other references' section at the conclusion of this Ruling.
[2] A hyperlink to the website is provided in the 'Other references' section at the conclusion of this Ruling.

Date of effect

11. This Ruling (excluding appendixes) is a public ruling for the purposes of section 105-60 and may be relied upon, both before and after its date of issue, by any entity to which it applies:

- Goods and Services Tax Ruling GSTR 1999/1 explains the goods and services tax (GST) rulings system and the Commissioner's view of when you can rely on GST public and private rulings; and
- Wine Equalisation Tax Ruling WETR 2002/1 explains the wine equalisation tax (WET) rulings system and the Commissioner's view of when you can rely on WET public and private rulings.

12. This Ruling (excluding appendixes) is a public ruling for the purposes of Division 358 and may be relied upon, both before and after its date of issue. However, the Ruling will not apply to taxpayers 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 to 77 of Taxation Ruling TR 2006/10).

13. In recent years a practice has emerged in some areas of the Tax Office where compliance activities known as 'reviews' were not treated as constituting a tax audit, thereby giving the entity an 80% reduction in penalty (under subsection 284-225(2)) for voluntary disclosures made during the course of the review. This Ruling will not apply to entities in relation to voluntary disclosures made during the course of reviews notified prior to the date of issue of this Ruling, to the extent that the views expressed in this Ruling conflict with that previous practice. From the date of issue of this Ruling, this past practice will not be followed, except in relation to reviews notified prior to the date of issue of this Ruling. This Ruling will apply to entities in relation to all tax audits, including reviews (see paragraph 55 of the Ruling), notified on or after the date of issue of this Ruling.

Previous Ruling

14. Taxation Ruling TR 94/6 was withdrawn with effect from the date of issue of the draft Miscellaneous Taxation Ruling MT 2008/D3 on 14 May 2008.

Background

Legislative framework

15. 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.[3] 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 a tax 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[4] and franking tax shortfalls.[5]

16. 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.

17. 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.

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

19. 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, GST and pay as you go (PAYG) withholding and instalments.

20. Division 284 imposes a penalty where an entity:

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

[3] 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.
[4] Sections 226D, 226E and 226F of the ITAA 1936.
[5] 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) (Miscellaneous Taxation Ruling MT 2008/2 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;[6] or
- enters into a scheme to get a scheme benefit – section 284-145.

21. 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) as follows:

- 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.

22. 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.

23. 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.[7]

24. 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

[6] 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.
[7] 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).[8]

25. 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.

26. A flow chart showing the operation of section 284-225 is included at Appendix 2 of this Ruling.

27. In addition to the statutory reduction under section 284-225, the Commissioner also has a general power to remit penalty, either in full or in part, under section 298-20. PS LA 2006/2 provides guidelines for the exercise of the Commissioner's remission power in relation to penalty imposed under subsection 284-75(1).

Purpose of the voluntary disclosure provision

28. 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.

29. 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 tells them that a tax audit is to be conducted. The 80% reduction in penalty also acknowledges that entities who 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.

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

Ruling

Principles regarding the operation of section 284-225

30. 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 the public statement, requests the voluntary disclosure to be made.

31. 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?

32. 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.

33. 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.[9]

[9] Subsections 284-225(2) and 284-225(3).

34. 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

35. *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.*

36. *As the total shortfall amount disclosed for the accounting period is $1,000 or more, the penalty reduction provided in relation to the first disclosure would need to be revised.*

When does the automatic 80% reduction apply?

37. 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.[10]

When does the 20% reduction apply?

38. 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

[10] Subsections 284-225(2) to 284-225(4).

(iv) can reasonably be estimated to have saved the Commissioner a significant amount of time or resources in the tax audit.[11]

39. 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

40. If an entity 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 the Commissioner 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.

41. 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).

42. 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 54 to 59 of this Ruling. As the statutory definition is so broad, there may be some circumstances where it would be harsh not to allow the higher reduction.

43. 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.

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

(i) where the Commissioner is merely identifying and/or assessing risks, for example a risk review, notwithstanding that this is considered to be a tax audit;[12]

[11] Subsection 284-225(1).
[12] See paragraph 55 of this Ruling.

(ii) where the shortfall amount or scheme shortfall amount disclosed is not within the scope of the tax audit as notified to the entity (that is, it is outside the risk(s) or issue(s) covered by the tax audit);[13]

(iii) where, during the initial notification of the tax audit, the tax officer invites the entity to make a voluntary disclosure within a specified period or by a specified date, and the entity makes a full disclosure within that period or by that date;

(iv) where, during the initial notification of the tax audit, the tax officer advises the entity that the tax audit will commence at a subsequent date (known as the formal date of commencement), and the entity makes a full disclosure on or before that date; or

(v) 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.

45. However, the disclosure must still have been made voluntarily (see paragraphs 62 to 64 and 81 to 85 of this Ruling).

46. The discretion would not usually be exercised where the entity makes a voluntary disclosure after being notified of a tax audit which:

- is not about the identification or assessment of risk; and
- has been preceded by another tax audit (or tax audits) involving the identification and assessment of risk in relation to the matter(s) disclosed.

47. Furthermore, the discretion would also not usually be exercised where the entity makes a voluntary disclosure after being notified of a tax audit which has been preceded by a public statement issued by the Commissioner inviting voluntary disclosures in relation to the matter(s) disclosed.

48. Examples illustrating the above principles have been included in Appendix 1 of this Ruling.

[13] 'Scope' in this context does not include the type of tax-related liability or the accounting period(s)/taxable importation(s) covered by the tax audit. If an entity makes a voluntary disclosure about a shortfall amount or scheme shortfall amount that is not related to the type of tax-related liability or accounting period(s)/taxable importation(s) covered by the tax audit, the entity will have made the voluntary disclosure before notification of a relevant tax audit, under subsection 284-225(2) – see paragraphs 57 and 59 of this Ruling.

Application of section 284-225 to taxable importations

49. 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.

50. 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 reference to 'for an accounting period' in section 284-225 does not require the provision to be read down so as to exclude taxable importations.

51. 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'.

52. 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'.[14]

53. 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.

[14] *Cooper Brookes (Wollongong) Pty. Limited v. Federal Commissioner of Taxation* (1981) 11 ATR 949 at 966; 81 ATC 4292 at 4305.

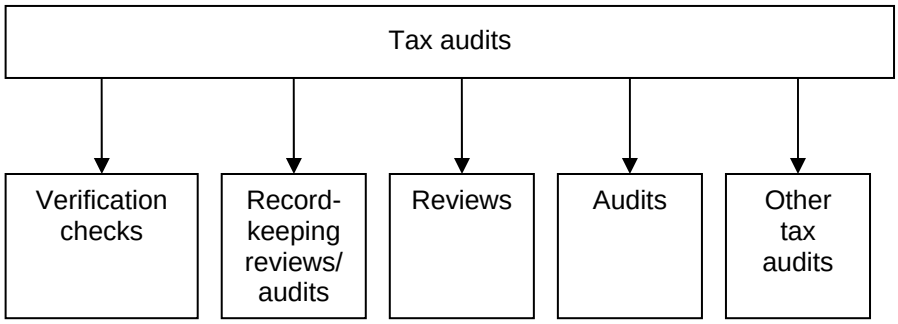
Commissioner's interpretation of important concepts

What is a 'tax audit'?

54. 'Tax audit' is defined as 'an examination by the Commissioner of an entity's financial affairs for the purposes of a taxation law'.[15] The definition is very broad, and covers not only traditional audits the Commissioner undertakes to ascertain an entity's tax-related liability but *any* examination of an entity's financial affairs.

55. The Commissioner undertakes a range of compliance activities which involve an examination of an entity's financial affairs and are therefore considered to be tax audits, including reviews, audits, verification checks, record-keeping reviews/audits and other similar activities (see Figure 1 below). However, the definition of tax audit does not include activities that are merely educational in nature and do not involve an examination of a particular entity's financial affairs, for example a bulk mail out of letters reminding rental property owners of what can and can not be claimed as a tax deduction in relation to their rental property.

Figure 1 – tax audits



56. The Australian Customs Service (Customs) also performs certain functions on behalf of the Commissioner in relation to taxable importations, including the collection of relevant tax-related liabilities. As such, examinations of taxable importations undertaken by Customs officers will also be regarded as a 'tax audit', to the extent that the examination relates to the importer's liability under a taxation law, for example GST.

57. Because the statutory definition of tax audit is so broad it may result in circumstances where it is harsh to not allow the higher reduction in penalty, for example where the Commissioner is merely identifying and/or assessing risks. In these cases, the Commissioner will generally exercise the discretion under subsection 284-225(5) (see paragraph 44 of this Ruling), the effect of which is to provide the entity with an 80% or full reduction in the penalty otherwise attracted.

[15] Subsection 995-1(1) of the *Income Tax Assessment Act 1997* (ITAA 1997).

58. 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 49 to 53 of this 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.

59. A tax audit will also only be relevant for the purposes of section 284-225 where it relates to the same type of tax-related liability as the shortfall amount (or part of it) that is voluntarily disclosed, unless concurrent tax audits are being undertaken. For example, a tax audit in relation to income tax will not be relevant in relation to a voluntary disclosure made about a shortfall amount of GST (unless concurrent tax audits are being undertaken). See also paragraph 78 of this Ruling.

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

60. 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. However, it should be clear on the face or tenor of the communication that a tax audit is to be conducted into the financial affairs of the entity.

61. As stated in paragraph 58 of this 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 have been made before being told of a tax audit.

What is the meaning of 'voluntarily tell'?

62. 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.

63. 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 unless they were aware that the Commissioner was about to uncover the shortfall amount or scheme shortfall amount (this includes where an entity intentionally disregards a taxation law).

64. However, mere suspicion that the entity would not have come forward will not be sufficient.

Example 2 – disclosure not made voluntarily

65. *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.*

66. *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.*

67. *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

68. *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.*

69. *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.*

70. 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.

71. 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 tells the entity of 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

72. *The Tax Office conducts a routine data-matching exercise in relation to interest income. Raj is identified as having omitted $3,000 of interest 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.*

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

Example 5 – disclosure over and above amount identified by the Commissioner

74. *The Tax Office identifies that Benton has a shortfall amount of $10,000 in PAYG withholding amounts for the June 2007 quarter. The Commissioner informs Benton of the shortfall amount and the commencement of an audit in relation to his PAYG withholding liability for that quarter. Benton confirms the Tax Office findings but advises that the actual shortfall amount is $12,000. The tax officer determines that the disclosure was made voluntarily and that it saved significant resources for the Commissioner.*

75. *The confirmation by Benton of the $10,000 shortfall does not qualify for a reduction in penalty, as the Commissioner had already identified that part of the shortfall amount. However, Benton will be entitled to a 20% reduction in penalty in relation to the additional $2,000 disclosed, as he has voluntarily made a disclosure about part of a shortfall amount which was unknown to the Commissioner, and the disclosure saved the Commissioner a significant amount of resources.*

76. 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)

77. In the context of subsection 284-225(2) 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 taxable importation to which the disclosure relates); or
- before the date mentioned in a relevant public statement made by the Commissioner.

78. 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 tax 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 tax audits of both taxes are being undertaken or paragraph 63 of this Ruling applies.

79. Similarly, disclosures about shortfall amounts or scheme shortfall amounts relating to an accounting period or taxable importation not under a tax audit will be accepted as having been made voluntarily, unless paragraph 63 of this Ruling applies.

80. 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)

81. 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 63 of this Ruling still applies.

82. A voluntary disclosure in this sense assumes a level of cooperation and assistance by the entity that is above that ordinarily expected of an entity during the conduct of a tax audit. The Taxpayers' charter *If you're subject to enquiry or audit* (NAT 2558) outlines what is ordinarily expected of an entity during the conduct of a tax audit.

83. 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 70 of this 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.

84. 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.

85. 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)?

86. 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 in the tax audit. This is an objective test.

87. A disclosure made early during a tax 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 in looking into the matter disclosed.

88. The reduced rates of penalty for disclosures made after notification of a tax 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

89. 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. The approved form for voluntary disclosures can be found under the Forms section on the Tax Office website.[16]

90. The Revised Explanatory Memorandum to the A New Tax System (Tax Administration) Bill (No. 2) 2000 states, at paragraph 1.129, that 'telling the Commissioner about the shortfall will require a taxpayer to disclose the relevant facts and other information to enable the Commissioner to adjust the tax-related liability.'

91. 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.

92. 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

93. 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.[17]

94. 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.

[16] A hyperlink to the website is provided in the 'Other references' section at the conclusion of this Ruling.
[17] See Division 359, and sections 105-60 and 356-5 in relation to private indirect tax rulings.

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

95. The Commissioner may accept statements made by entities in amendment requests for the purposes of making an assessment.[18] 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.

96. A request for a debit 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

97. Subsection 995-1(1) of the ITAA 1997[19] defines 'approved form' as having the meaning given by section 388-50.

98. 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 by the Commissioner for that kind of return, notice, statement, application or other document;
- it contains a declaration signed[20] by a person or persons as the form requires;
- 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.

[18] For example, subsection 169A(1) of the ITAA 1936.
[19] Subsection 3AA(2) of the TAA provides that an expression has the same meaning in Schedule 1 to the TAA as in the ITAA 1997.
[20] A signature includes an electronic or telephone signature if the document is being lodged electronically or by telephone respectively (see section 388-75).

Base penalty amount

99. In the context of Division 284 of Schedule 1 of the TAA, 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 of Schedule 1 of the TAA, where the penalty is for a false or misleading statement, or a position that is not reasonably arguable, and
- section 284-160 of Schedule 1 of the TAA, where the penalty relates to a scheme.

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

Scheme

101. '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.

102. 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

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

104. 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

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

106. 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

107. '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.

108. 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) of Schedule 1 of the TAA.

Tax audit

109. '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

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

111. 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).

112. Section 250-10 contains tables outlining various types of tax-related liabilities.

Taxable importation

113. 'Taxable importation' is defined in subsection 995-1(1) of the ITAA 1997 as having the meaning given by section 195-1 of the GST Act.

114. Section 195-1 of the GST Act in turn refers to subsections 13-5(1) and 114-5(1) of that Act. Under these provisions, an entity will make a taxable importation if:

- goods are imported and the entity enters the goods for home consumption, or
- one of the items in the table in subsection 114-5(1) of the GST Act applies.

115. However, an importation is not a taxable importation to the extent that it is a non-taxable importation.

Commissioner of Taxation
12 November 2008

Appendix 1 – Examples relating to the Commissioner's discretion in subsection 284-225(5)

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

116. 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.

117. 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 the discretion. For this reason it would not be appropriate to make any of the examples part of the 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[21]

118. 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.

119. 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. The Commissioner considers that the disclosure was made voluntarily.

120. A record-keeping review is a tax audit for the purposes of section 284-225. While the disclosure was made voluntarily after John had been notified of the record-keeping review, the auditor determines that it is unlikely that the shortfall amount would have been detected by the record-keeping review. The auditor also determines that there is no evidence that John only made the disclosure because the Tax Office was about to undertake a review. As such, the Commissioner would exercise the discretion under subsection 284-225(5) to treat the disclosure as having been made before the notification of the tax audit.

[21] Refer to subparagraph 44(ii) of this Ruling.

Example 7 – exercise of the Commissioner's discretion where the disclosure relates to a matter outside the scope of the audit[22]

121. 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, subsequently 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.

122. 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 the 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[23]

123. 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.

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

125. 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 the discretion under subsection 284-225(5) to treat the disclosure as having been made before the entity was informed of the tax audit.

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[22] Refer to subparagraph 44(ii) of this Ruling.
[23] Refer to subparagraph 44(v) of this Ruling.

Example 9 – exercise of the discretion where voluntary disclosure made prior to the formal date of commencement of the tax audit, application of principles to taxable importations[24]

126. In March 2007, Customs notifies Import Right Pty Ltd, an importer, that monitoring powers under section 214AB of the *Customs Act 1901* are to be exercised on 16 and 17 April 2007 to verify compliance with a Customs-related law.[25] The notice of intention to exercise monitoring powers states that import declaration AACTJTCKF is to be audited.

127. On 2 April 2007 the importer advises Customs of an error which resulted in a shortfall amount of GST in the amount of $1,593.51. The importer advises that the error was identified due to the checking of the commercial documents relating to the goods prior to the commencement of the audit. The Customs officer accepts the importer's explanation for the discovery of the error.

128. The exercise of the monitoring powers, to the extent that it relates to the importer's liability under a taxation law (including the GST Act), constitutes a tax audit. As such, the voluntary disclosure of Import Right Pty Ltd has been made after the notification of a tax audit. However, as the disclosure was made voluntarily before the formal date of commencement of the tax audit (being 16 April 2007), the Commissioner would exercise the discretion under subsection 284-225(5) to treat the disclosure as having been made before the notification of the tax audit.

Example 10 – exercise of the discretion where the Commissioner is merely identifying and assessing risks[26]

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

130. 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.

131. 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 is merely identifying and assessing risk at this stage, it is appropriate for the Commissioner to exercise the discretion to treat the disclosure as having been made before the notification of the tax audit.

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[24] Refer to subparagraph 44(iv) of this Ruling.
[25] The definition of 'customs-related law' in section 4B of the *Customs Act 1901* includes, for the purposes of this example, the GST Act as it relates to the importation of goods where the importation is subject to GST.
[26] Refer to subparagraph 44(i) of this Ruling.

Example 11 – 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[27]

132. 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.

133. 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.

134. In these circumstances, the Commissioner would not exercise the 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.

135. 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.

136. The Commissioner would exercise the discretion under subsection 284-225(5) to treat the disclosure about the research and development expenditure claim 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.

Example 12 – no exercise of discretion where previous opportunity to make a voluntary disclosure through a public statement[28]

137. 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 investment income by 30 June 2007.

138. 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.

139. 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.

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

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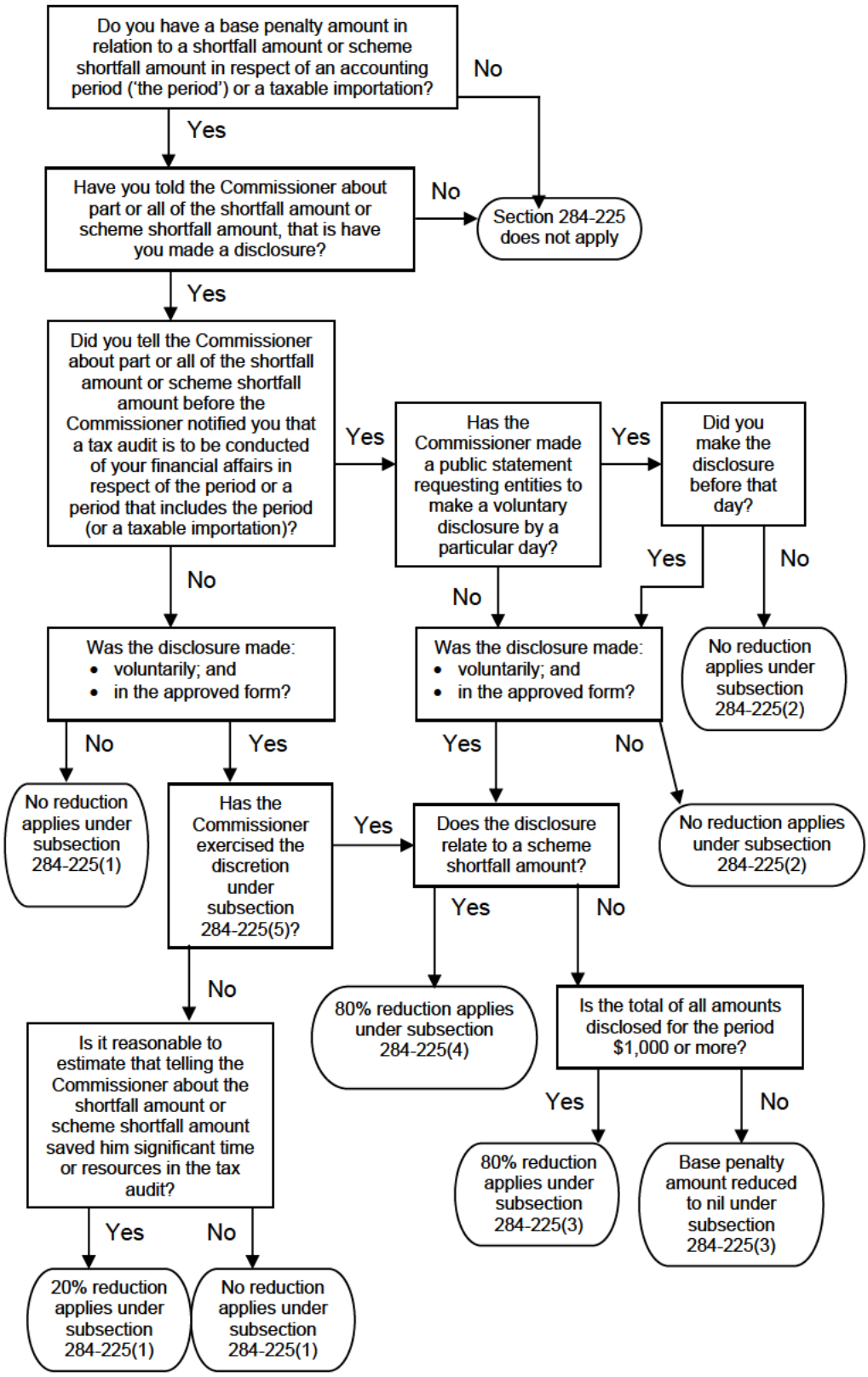
[27] Refer to paragraph 46 of this Ruling.
[28] Refer to paragraph 47 of this Ruling.

Appendix 2 – Flow chart on the operation of section 284-225

This Appendix does not form part of the binding public ruling.

141. The following is a flow chart demonstrating the operation of section 284-225.



Appendix 3 – Detailed contents list

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References

Previous draft:

Previously released as MT 2008/D3

Related Rulings/Determinations:

TR 94/3; MT 2008/2; TR 2006/10; GSTR 1999/1; WETR 2002/1

Previous Rulings/Determinations:

TR 94/6

Subject references:

- administrative penalty
- taxpayer disclosures
- voluntary disclosures

Legislative references:

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