TAXATION INSTITUTE OF AUSTRALIA

26th May 2005

Mr Peter Hallahan
The Secretary
Senate Economics Legislation Committee
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Canberra ACT 2600

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Dear Mr Hallahan

Inquiry into the Tax Laws Amendment (Improvements to Self Assessment) Bill (No.1) 2005 and the Shortfall Interest Charge (Imposition) Bill 2005

Thank you for inviting the Taxation Institute of Australia (the Taxation Institute) to provide its comments to the Senate Economics Legislation Committee on the Tax Laws Amendment (Improvements to Self Assessment) Bill (No.1) 2005 and the Shortfall Interest Charge (Imposition) Bill.

Earlier this year, the Tax System Review Division of the Treasury invited the Taxation Institute to comment on the draft legislation on which the abovementioned Bills are based. As a result of our review of this draft legislation, in our submission to the Treasury on 14th February 2005 we raised a number of concerns about the proposed shortfall interest charge and penalty provisions.

We are very disappointed that many of the issues and concerns we raised in this submission have been overlooked or not adequately addressed in the Bills currently before the Senate Economics Legislation Committee.

In particular, it is grossly inequitable that the Bill continues to extinguish a taxpayer's objection, review and appeal rights at the arbitrary 20 percent remission threshold. There should be no monetary limit to a review of the Commissioner's discretion, just as there is no monetary limit in respect of an objection to an ordinary assessment.

Our concerns in relation to Schedule 1 – Shortfall Interest Charge and Schedule 2 – Penalties of the Tax Laws Amendment (Improvements to Self Assessment) Bill (No.1) 2005 are set below.

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Schedule 1 – Shortfall Interest Charge

Paragraph 280-170 Objecting against remission decision

The absence of appeal rights where the shortfall interest is less than 20 percent of the tax shortfall is harsh and unjustified. Where a taxpayer has grounds for full remission or remission below 20 percent of the tax shortfall, it is unacceptable that the ATO can effectively extinguish the taxpayers objection, review and appeal rights by simply remitting only to the 20 percent threshold.

Furthermore, the justification for this exclusion (at paragraphs 2.77 – 2.82 of Explanatory Memorandum (EM) to the Bill) based upon the cost of objections and appeals does not ring true.

The Taxation Institute is of the view that there should be no monetary limit to a review of the Commissioner's discretion, just as there is no monetary limit in respect of an objection to an ordinary assessment. For example, 19 percent of one million dollars is a substantial amount that should always be open to review.

Para 280-160(2) – Remitting shortfall interest charge

The illustration of cases that would satisfy a remission request under this paragraph (listed in paragraphs 2.65 – 2.67 of the EM) should also specifically include ATO "inaction" (ie the ATO was aware of problems (eg a scheme) but fails to undertake any action to deal with the issue) as a ground for remission.

Also, the cases currently listed in paragraph 2.66 of the EM should include a retrospective change in ATO interpretation (which may occur where a Ruling is issued) as grounds for remission.

Para 280-165 – Commissioner must give reasons for not remitting in certain cases

In paragraph 2.27 of the EM, it states that a remission request must be made on "in the approved form". This type of phrase is used in numerous parts of the legislation and in the many cases there is no approved form. The sentence should state that "a remission request must contain details sufficient for the Commissioner to determine the matter".

Shortfall Interest Charge uplift

To be effective and truly reflect the cost of funds, the uplift must be compressed. In our earlier submission to Treasury, to achieve this we argued that the uplift should be not be greater than about two percent, rather than three percent under the current proposed arrangements.

Schedule 2 - Penalties

Changes to Subsection 284-15(1) in Schedule 1

The confusion in s 284-15 arose due to the rewrite of s 222C(1), which defined a matter as being reasonably arguable if "it would be concluded that what is argued for is about as likely as not correct." In contrast, s 284-15(1) states that a matter is reasonably arguable if "what is argued for is as likely to be correct as incorrect, or is more likely to be correct than incorrect".

In spite of the opinion expressed in the *Explanatory Memorandum to A New Tax System (Tax Administration) Bill (No 2) 2000* at paragraph 1.20 that "…(a)lthough the wording has been refined, the concept has the same meaning as in s 222C…", the wording of s 284-15(1) alters the meaning of reasonably arguable because it establishes a more stringent test whereby the prospects that the taxpayer's treatment of a matter as being the correct treatment must be greater than 50 percent.

This conflicts with s 222C(1) where the test is "about as likely as not". As indicated in Taxation Ruling TR 94/5, this latter test simply means that there only has to be a substantial likelihood that the taxpayer's treatment of a matter is the correct treatment, whether or not those prospects are less than or greater than 50 percent.

Therefore, this change does not go far enough and the words in s 284-15(1) ("or is more likely to be correct than incorrect") need to be deleted to restore the clear s 222C meaning . The correct interpretation of what is "reasonably arguable" has been clearly set out by Hill J in *Walstern v FCT* [2003] FCA 1428. This reasoning was accepted as correct by both at first instance and on appeal in *Pridecraft Pty Ltd v FCT* [2004] FCA 650 & [2004] FCAFC 339. To avoid confusion this should be accepted as the correct test.

Should you have any queries with respect to the above, please do not hesitate to contact the Institute's Tax Counsel Michael Payne-Mulcahy on (02) 8223 0011.

Yours faithfully

John de Wijn QC
President