

# Call in for a Coffee - Tax News

## New Australian measures to combat tax exploitation schemes

Following our recent article on the UK Government's tax avoidance disclosure rules, we now bring to the attention of Australian tax residents based in Thailand that the Australian Government has introduced new tax measures to combat the promotion of tax exploitation schemes.

The new Australian measures are contained in the Tax Laws Amendment (2006 Measures) Bill, which was introduced into Parliament on 16 February 2006.

The measures are aimed at providing a strong deterrent to promotion of tax avoidance and tax evasion schemes that exploit the Australian tax system by imposing a severe penalty on promoters of tax exploitation schemes.

The new penalty also applies to a person who implements a tax exploitation scheme, which has misleadingly been promoted as complying with a product ruling provided by the Australian Taxation Office.

In addition, a number of real time measures are also in the legislation to allow the Commissioner of Taxation to seek injunctions and to enter into voluntary undertakings with promoters.

The Government said that through these measures, "the creation of tax exploitation schemes will be discouraged and the chance of investors being unwittingly enticed to enter into schemes which avoid or evade tax will be reduced.

The measures will encourage greater confidence and certainty in our [the Australian] community and encourage more efficient, productive and legitimate investment in the business sector."

## Penalties

The legislation allows the Commissioner of Taxation to apply to the Australian Federal Court for an order that a promoter pay a penalty if it is satisfied that the promoter:

- Has engaged in conduct that resulted in an individual or entity being a promoter of a tax exploitation scheme;
- Has engaged in conduct that resulted in another individual or entity being a promoter of a tax exploitation scheme; or,

- Has engaged in conduct that resulted in a scheme, promoted on the basis of conformity with a product ruling, being implemented in a materially different way to that intended.

The Court determines what penalty is appropriate, in line with the following (current) amounts:

- For individuals, the greater of \$550,000 and twice the consideration received in respect of the scheme;
- For companies, the greater of \$2,750,000 and twice the consideration received in respect of the scheme.

## Undertakings and injunctions

In addition to the ability of the Commissioner of Taxation to apply the above penalties, the Tax Laws Amendment (2006 Measures) Bill introduces the following real time measures, which enable the Commissioner of Taxation to:

- Enter into a voluntary undertaking with promoters; and,
- Apply to the Court for an injunction to stop promotion of tax exploitation schemes.

## Promoter

In broad terms, a promoter of a tax exploitation scheme is an individual or entity, which:

- Markets a tax exploitation scheme or encourages its growth or interest in it;
- Receives consideration in respect of that marketing or encouragement; and,
- It is reasonable to conclude a substantial role in the marketing or encouragement of the tax exploitation scheme.

## Tax exploitation scheme

A scheme is a tax exploitation scheme if:

- It is reasonable to conclude that a participant entered into or carried out the scheme with the sole or dominant purpose of obtaining a tax benefit, i.e. a reduction in tax; and,

- It is reasonably arguable that the scheme benefit is not available under the law.

## Exceptions to penalty imposition

In addition to the reasonable argument that the scheme benefit is available under the law, the Court is precluded from imposing penalties where:

- The offending conduct was due to a reasonable mistake of fact;
- The offending conduct was due to the act or default of another individual or entity, an accident or some other cause beyond the individual's or entity's control providing the individual or entity took reasonable precautions and exercised due diligence to avoid the conduct; and,
- For individuals and entities whose conduct results in another individual or entity being a promoter of a tax exploitation scheme or an implementer, the individual or entity did not know, and could not reasonably be expected to know, that the individual's or entity's conduct would produce that result.

## Australian tax entities and residents in Thailand

The new legislation is very broadly drafted and Australian tax residents in Thailand would be wise to familiarize themselves with the new Australian measures that combat tax exploitation schemes.

Steven Herring CA  
Corporate Tax Consultant

## RSM Thailand

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The RSM Thailand service line leaders are:

[Gareth.Hughes@rsmnw.com](mailto:Gareth.Hughes@rsmnw.com) Corporate Advisory  
[Mark.Butters@rsmnw.com](mailto:Mark.Butters@rsmnw.com) Accounting & Tax Compliance  
[Mike.Holloway@rsmnw.com](mailto:Mike.Holloway@rsmnw.com) Recruitment  
[Pardorn.Suchiva@rsmnw.com](mailto:Pardorn.Suchiva@rsmnw.com) Business Services & Legal  
[Prawit.Wipusirikup@rsmnw.com](mailto:Prawit.Wipusirikup@rsmnw.com) Audit & Assurance  
[Steven.Herring@rsmnw.com](mailto:Steven.Herring@rsmnw.com) Taxation Consulting  
[Surachai.Damnoenwong@rsmnw.com](mailto:Surachai.Damnoenwong@rsmnw.com) Audit & Assurance

## Contact Details

**RSM Nelson Wheeler (Thailand) Limited**

26th Floor, Sathorn City Tower,

175 South Sathorn Road,

Bangkok 10120, Thailand

Telephone: 66 (0) 2670-9002-6

Facsimile: 66 (0) 2670-9027-8

Website: [www.rsmnelsonwheeler.co.th](http://www.rsmnelsonwheeler.co.th)

Email Address: [askus.bangkok@rsmnw.com](mailto:askus.bangkok@rsmnw.com)