The Tax Practitioners Board (Board) has released this draft Information sheet as an Exposure draft and invites comments and submissions in relation to the information contained in it within 60 days. The closing date for submissions is 13 November 2012. The Board will then consider any submissions before settling its position, undertaking any further consultation required and finalising the Information sheet.

Written submissions should be made by the closing date to the Secretary of the Board via email at tpbsubmissions@tpb.gov.au or by mail to:

Tax Practitioners Board  
PO Box 9825  
PENRITH NSW 2740

DISCLAIMER

This document is in draft form, and when finalised, will be intended as information only. While it seeks to provide practical assistance and explanation, it does not exhaust, prescribe or limit the scope of the Board’s powers in the Tax Agent Services Act 2009 (TASA). The principles and examples in this paper do not constitute legal advice. They are also only at a preliminary stage. The Board’s conclusions and views may change as a result of comments received or as other circumstances change.

Document History

This draft information sheet was issued on 14 September 2012 and is based on the TASA as at 10 September 2012.
Reasonable care to ensure taxation laws are applied correctly

Introduction

1. This Information Sheet (TPB(I)) has been prepared by the Tax Practitioners Board (Board) to assist registered tax agents and BAS agents (registered agents) to understand their obligations under the Code of Professional Conduct (Code) in relation to taking reasonable care to ensure that taxation laws are applied correctly to the circumstances in relation to which they are providing advice to a client (Code Item 10).

2. In this TPB(I), you will find the following information:
   - background on Code Item 10 and reasonable care;
   - consequences for failing to comply with Code Item 10; and
   - practical examples involving Code Item 10.

What is Code Item 10?

3. All registered agents are required to comply with the Code, which is contained in section 30-10 of the Tax Agent Services Act 2009 (TASA).

4. Under Code Item 10, registered agents must take reasonable care to ensure that taxation laws are applied correctly to the circumstances in relation to which the agent is providing advice to a client.

5. The Board has released an explanatory paper on the application of the Code that details the Board’s view on Code Item 10.¹

What does ‘reasonable care’ mean?

6. The standard of ‘reasonable care’ generally required of a registered agent is that of a competent and reasonable person, possessing the skills, qualifications and experience that a registered agent is expected to have.

7. What is ‘reasonable care’ depends upon a range of factors, including the scope of the tax agent services and BAS services being provided and the client’s level of professional knowledge and experience.

**What is ‘reasonable care in ensuring that taxation laws are applied correctly’?**

8. There is no set formula for what it means to take reasonable care in any given situation.

9. The starting point for determining what is reasonable care in this situation is giving appropriate serious attention to complying with the obligations imposed under a taxation law at a standard that could be expected of a reasonable person, objectively determined. This will involve a registered agent exercising their own professional skills and judgement.

10. A registered agent must take reasonable care to ensure the correct interpretation and application of the law in the circumstances. This does not mean that reasonable care has not been taken if the agent does not actually determine the correct interpretation and application of the law.

11. For example, an agent will not breach Code Item 10 simply because they applied the taxation laws incorrectly if, in reaching that position, the agent took reasonable care to determine the correct taxation treatment of an item in a client’s tax return and still applied the laws incorrectly. Keeping good working papers and notes on file will assist both the registered agent and the client, if safe harbour becomes an issue.

12. If, on the other hand, the agent applied the taxation laws incorrectly to the circumstances of a client and, in doing so, did not take reasonable care to determine the correct taxation treatment of the item, the agent may breach the Code.

13. It is considered that more care is expected of a registered agent than a taxpayer completing their own return. This higher standard of care is a reflection of the knowledge, education, experience and skill expected of a registered agent.

14. Taking reasonable care required by Code Item 10 may include the registered agent referring to:

- legislation and related extrinsic material (for example, explanatory memoranda for Acts);
- relevant case law;
- rulings and determinations issued by the Commissioner on the topic in question;
- the Commissioner’s instructions in documents such as income tax returns, BAS returns, fact sheets and practice statements;
- any other relevant guidance published by the Australian Taxation Office on its website;
- information published or provided by a recognised professional association or other regulatory agency;
• information or relevant commentaries published by other experts, registered agents or specialists; and/or
• another registered agent or another appropriately qualified person who has the ability and resources to provide advice on taxation laws.

Reasonable care and reasonably arguable position

15. Subsections 284-75(2) and 284-90(1) in Schedule 1 to the Taxation Administration Act 1953 (TAA) impose a penalty where:

• a statement is made by an entity or its agent, which treats an income tax law as applying to a matter in a particular way that is not reasonably arguable; and
• a shortfall amount resulting from the statement exceeds the relevant threshold amounts set out in items 4, 5 or 6 of the table in subsection 284-90(1) in Schedule 1 to the TAA.

16. A position is reasonably arguable if it would be concluded in the circumstances, having regard to relevant authorities, that it is at least as likely to be correct as incorrect. That is, objectively, can the taxpayer’s argument, while wrong, be argued on rational grounds to be right. ²

17. If a registered agent takes a reasonably arguable position regarding the operation of a taxation law, the agent has probably taken reasonable care to apply taxation laws correctly. However, the individual circumstances will need to be examined.

18. Taking reasonable care requires a registered agent to act in a manner that is expected of a reasonable person in the position of the registered agent, objectively determined. On the other hand, whether there is a reasonably arguable position is an objective question as it requires an objective analysis of the law and the application of the laws to the relevant facts.

19. Although demonstrating a reasonably arguable position involves the application of a purely objective test, an entity will usually reach their position (at the time of making the statement) as a result of researching and considering the relevant authorities. In these circumstances, the efforts made by the entity to arrive at the correct taxation treatment will also demonstrate that reasonable care has been shown.³

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² Miscellaneous Taxation Ruling MT 2008/2 Shortfall penalties: administrative penalty for taking a position that is not reasonably arguable at paragraph 37.

³ Miscellaneous Taxation Ruling MT 2008/2 Shortfall penalties: administrative penalty for taking a position that is not reasonably arguable at paragraph 31.
Consequences for failing to comply with Code Item 10

20. From the perspective of the Board, if an agent does not take reasonable care to ensure that taxation laws are applied correctly, the Board may find that the agent has breached the Code and may impose sanctions for that breach.

21. If an agent breaches the Code, the Board may impose one or more of the following sanctions:

- a written caution;
- an order requiring the agent to do something specified in the order;
- suspension of the agent’s registration;
- termination of the agent’s registration.

Safe harbour provisions

22. From 1 March 2010, safe harbour provisions apply to administrative penalties in the Taxation Administration Act 1953 (TAA) for:

- false or misleading statements;⁴ and
- failure to lodge documents on time.⁵

23. The safe harbour provisions are administered by the Commissioner of Taxation (Commissioner), not the Board.

24. The safe harbour provisions in the TAA provide that, in general terms, where a taxpayer has engaged a registered tax agent or BAS agent, so long as the taxpayer can demonstrate that all relevant information required to enable the agent to make a statement or give a return, notice, statement or other document to the Commissioner on behalf of the taxpayer was provided to his or her tax agent or BAS agent, the taxpayer will not be subject to an administrative penalty for:

- making a false or misleading statement that results in a shortfall amount; or
- failing to lodge a document on time;

unless the shortfall amount, or failure, resulted from:

- an intentional disregard by the registered tax agent or BAS agent of a taxation law; or
- recklessness by the registered agent as to the operation of a taxation law.

⁴ See subsection 284-75(1) in Schedule 1 to the TAA.
⁵ See subsection 286-75(1) in Schedule 1 to the TAA.
25. Where the ATO, or a court or tribunal, makes a decision about the application of the safe harbour provisions to the circumstances of a taxpayer, that decision may involve a finding that a tax agent or BAS agent, in making a statement or failing to give a return, notice, statement or other document to the Commissioner on behalf of the taxpayer, has failed to take reasonable care.

26. Such a finding in relation to an agent’s conduct, while not binding on the Board, may be considered by the Board in assessing whether an agent has breached Code Item 10.

27. Before the Board can determine if an agent has breached the Code, the Board must conduct an investigation. The Board will decide whether an investigation is required having regard to all the circumstances and will not necessarily conduct an investigation in every case. In the case of isolated mistakes, the Board may take no specific action.

Practical examples involving Code Item 10

28. The following examples explain the application of Code Item 10.

Reasonable care and reasonably arguable position

Example 1
Sarah, a registered tax agent, lodges Walter’s income tax return. The ATO denies a particular deduction claimed in the income tax return, which results in a shortfall amount that makes Walter potentially subject to an administrative penalty. The ATO considers the matter and decides that Sarah took a reasonably arguable position in relation to the operation of the relevant provision of the tax law. Accordingly, Walter is not liable for an administrative penalty.

The Board considers that as Sarah has taken a reasonably arguable position regarding the operation of a taxation law, and looking at the individual circumstances of the case, Sarah has taken reasonable care to ensure that the taxation laws were applied correctly under Code Item 10.

The need to refer to ATO publications

Example 2
Bob engages Julie, a registered tax agent, to provide GST related tax advice. As the majority of Julie’s work involves providing income tax advice, her experience and knowledge in GST is not up to date. Julie does not check the relevant law and publications by the ATO, including the Commissioner’s views as expressed in rulings and determinations, and provides advice to Bob that is based on her existing limited knowledge of the GST law. As a result, Julie’s advice to Bob is incorrect.

Julie is in breach of Code Item 10 for failing to take reasonable care to ensure the correct application of the taxation laws to Bob’s circumstances.
Engaging an expert consultant and relying on work of another registered agent

**Example 3**

Construction Co, have been using the services of Betty & Co, a registered tax agent, to assist them in meeting their tax obligations. Construction Co is now considering whether to consolidate a number of wholly-owned corporate groups as single entities and seeks advice from Betty & Co.

After consulting the relevant authorities and sources, Betty & Co are still unsure how to apply the relevant taxation laws relating to the consolidations regime and seeks assistance from another registered tax agent, Juan Limited.

Before seeking assistance from Juan Limited, Betty & Co check to ensure that Juan Limited has the ability and resources to provide advice on the consolidations regime.

As Betty & Co recognised that they did not have the required knowledge and skills necessary to advise on the consolidations regime and they sought assistance from a registered tax agent that they considered to be in a position to provide the relevant advice, Betty & Co have exercised reasonable care under Code Item 10 in providing tax advice to Construction Co.

Engagement letters and contractual arrangements

**Example 4**

Zachery engages Max, a registered BAS agent, to provide advice on the fuel tax law and to lodge his business activity statement (BAS). The engagement letter between Zachery and Max includes a provision that Max spends no more than 1 hour in relation to the fuel tax law advice.

Max’s knowledge of the fuel tax law is limited and because he only has 1 hour to complete the advice, he does not undertake any further research to ensure that the taxation laws are being applied correctly.

Max lodges Zachery’s BAS and it turns out that it is incorrect in respect of the fuel tax credit. Max has breached Code Item 10 by failing to take reasonable care to ensure that he has applied taxation laws correctly to Zachery’s circumstances.

Max cannot contract out of his obligations under the Code of Professional Conduct by including a clause in his engagement letter with Zachery. Max is still responsible for ensuring that he provides BAS services in accordance with appropriate standards of professional and ethical conduct including ensuring that he does not make false or misleading statement to the Commissioner or that he prepares such a statement that he knows, or should know, is likely to be made to the Commissioner.
Refusing client instructions

Example 5

The client of a BAS agent bought some bar stools for her new house but wanted the cost of the stools to be shown as a business expense in her accounts. The client instructed the BAS agent to claim the cost of the stools as a business expense.

In this case, if the agent knows or reasonably suspects that something is not a business expense, then the agent cannot be party to preparing or lodging a BAS or other report for the purposes of claiming back GST or claiming some deduction under the taxation laws with respect to a non-tax deductible expense.

The agent should not claim the amount as such but should make a note of how they have considered the expense and then return the material to the client to allow the client to either seek further advice in relation to the expense, lodge the return themselves noting the BAS agent’s advice or providing alternative instructions based on further advice from another registered agent.

The BAS agent cannot lodge a return that is not authorised by the client. Equally, however, the agent cannot lodge a return that is false or misleading.

One approach to handling this issue may include:

- coding the payment to a suspense account;
- not claiming back the GST;
- advising the client about what the agent has done and prepare reports based on what the agent believes to be correct;
- posting the payment to assets in the business accounts, but still not claiming GST. However a note could be made about the private assets in the business accounts so that a tax agent could advise on the appropriate income tax treatment of payment.

Example 6

Tyler is a registered BAS agent and is completing a BAS for Eddie, his client. Eddie instructs Tyler to record $2,000 as the amount withheld from his employees’ salaries during the quarter. On reviewing Eddie’s records, Tyler finds that Eddie has in fact withheld $5,000 from his employees’ salaries. When queried, Eddie states that he has had unexpected expenses for the past quarter and therefore intends to record only $2,000 of the withheld amount in this BAS and the remaining $3,000 in the next quarter. Tyler would be knowingly making a false statement if he continues with Eddie’s request.

Because Eddie insists that the misstatement be made and Tyler is unable to resolve the issue, to avoid a civil penalty Tyler resigns from the engagement. Knowingly making a false or misleading statement would demonstrate intentional disregard of the taxation laws. Further, recklessly making a false or misleading statement to the Commissioner would demonstrate such lack of reasonable care that the agent will breach the Code.