



# TPB Information sheet

## TPB(I) 18/2013

### Code of Professional Conduct – Reasonable care to ensure taxation laws are applied correctly

#### **Disclaimer**

This is a Tax Practitioners Board (TPB) Information sheet (TPB(I)). It is intended to be for information only. It provides information regarding the TPB's position on the application of subsection 30-10(10) of the *Tax Agent Services Act 2009* (TASA), containing one of the obligations of registered agents under the Code of Professional Conduct (Code). While it seeks to provide practical assistance and explanation, it does not exhaust, prescribe or limit the scope of the TPB's powers in the TASA.

In addition, please note that the principles, explanations and examples in this TPB(I) do not constitute legal advice and do not create additional rights or legal obligations beyond those that are contained in the TASA or which may exist at law. Please refer to the TASA for the precise content of the legislative requirements.

#### **Document history**

The TPB released this document as a draft information sheet in the form of an Exposure draft on 30 July 2013. The TPB invited comments and submissions in relation to the information in it. The closing date for submissions was 29 August 2013. The TPB considered the submissions made and now publishes the following TPB(I).

Issued: 15 November 2013



# Reasonable care to ensure taxation laws are applied correctly

## Introduction

1. This Information Sheet (TPB(I)) has been prepared by the Tax Practitioners Board (TPB) to assist registered tax agents and BAS agents (registered agents) to understand their obligations under the Code of Professional Conduct (Code).
2. 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).
3. This TPB(I) provides guidance on the application of Code Item 10, which is one of the 14 principles contained within the Code.
4. In this TPB(I), you will find the following information:
  - what is Code Item 10
  - principles and elements of Code Item 10
  - consequences for failing to comply with Code Item 10
  - practical examples involving Code Item 10.
5. The Board has published an explanatory paper that sets out its views on the application of the Code, including Code Item 10.<sup>1</sup>

## What is Code Item 10?

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

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<sup>1</sup> Refer to paragraphs 133 to 138 of *TPB(EP) 01/2010 Code of Professional Conduct*, available at [www.tpb.gov.au](http://www.tpb.gov.au).



## Principles and elements of Code Item 10

### What does 'reasonable care' mean?

7. The duty to take reasonable care is a well-established feature of the common law in Australia. While Code Item 10 requires registered agents to take 'reasonable care' to ensure that taxation laws are applied correctly to the circumstances in relation to which the registered agent is providing advice to a client, the Code does not extend the common law duty of registered agents to take reasonable care. However, the Code does establish an additional range of possible statutory consequences under the TASA (see paragraphs 20 and 21 for more information on the consequences for failing to comply with Code Item 10).
8. There is no set formula for determining what it means to take reasonable care in any given situation. Rather, whether a registered agent has taken reasonable care in a given situation will depend on an examination of all the circumstances,<sup>2</sup> including the nature and scope of the tax agent services and BAS services being provided and the client's level of professional knowledge and experience.
9. The starting point for determining what reasonable care is will involve a registered agent exercising their own professional judgement taking into account relevant factors, such as the client's individual circumstances including their records and systems and the nature and complexity of the transaction.
10. The standard of 'reasonable care' generally required of a registered agent is that of a competent and reasonable person, possessing the knowledge, skills, qualifications and experience that a registered agent is expected to have, in the circumstances.
11. The Accounting Professional and Ethical Standards Board (APESB) has stated in *APES 110 Code of Ethics for Professional Accountants* and *APES 220 Taxation Services* that 'professional competence and due care' is a fundamental principle that members must comply with. This principle requires a member 'to maintain professional knowledge and skill at a level required to ensure that a client or employer receives competent professional services ... and act diligently in accordance with applicable technical and professional standards'. This requires, among other things, the exercise of sound judgement in applying professional knowledge and skill in the performance of such a service.<sup>3</sup>

### What is 'reasonable care in ensuring that taxation laws are applied correctly'?

12. The starting point for determining what is reasonable care in this situation is giving appropriate attention to complying with the obligations 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.

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<sup>2</sup> See, for example, Miscellaneous Taxation Ruling MT 2008/1 *Penalty relating to statements: meaning of reasonable care, recklessness and intentional disregard*.

<sup>3</sup> APESB *APES 110 Code of Ethics for Professional Accountants*, sections 100.5 and 130. See also *APES 220 Taxation Services*, paragraphs 3.11 to 3.17.



13. Code Item 10 requires registered agents to take 'reasonable care' to ensure the correct interpretation and application of the law. An incorrect interpretation and application of the law, therefore, may not necessarily amount to a failure to take reasonable care for the purpose of the TASA.
14. If, on the other hand, the registered 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 in the circumstances, the registered agent will likely be in breach of Code Item 10.
15. There is no set formula for what it means to take reasonable care in any given situation. However, it may include the registered agent referring to some or all of the following material to ensure that they apply the taxation laws correctly to their client's circumstances:
  - legislation and related extrinsic material (for example, explanatory memoranda to Acts)
  - case law
  - rulings and determinations issued by the Commissioner of Taxation (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 guidance material published by the Australian Taxation Office (ATO), including on its website
  - information published or provided by a recognised professional association or other relevant regulatory agency
  - publications, information, advice or commentaries published by other experts, registered agents or specialists
  - another registered agent or a legal practitioner who has the ability and expertise to provide the advice on taxation laws and/or
  - relevant training material.

### What does '... to the circumstances in relation to which the agent is providing advice to a client' mean?

16. The requirement to take reasonable care relates to the circumstances to which the registered agent is providing advice to their client and is therefore subject to the agreed terms of the engagement with the client.
17. The terms of the engagement with the client may arise from a variety of sources, which may include a letter of engagement, an email or a telephone communication. These terms will determine the scope of the engagement between the registered agent and their client and adherence to these terms will usually be the first step towards showing that reasonable care has been taken.
18. The TPB considers that a written agreement between a registered agent and their client that sets out the terms and conditions of the arrangement between the parties is prudent. An engagement letter is likely to be a simple way to assist a registered agent to comply with their obligations under the Code and to define the obligations of both parties. For further information on engagement letters, refer to *TPB(I) 01/2011 Letters of engagement*, available at [www.tpb.gov.au](http://www.tpb.gov.au)



19. In all cases, whether or not a registered agent has taken reasonable care under Code Item 10 will be a question of fact to be determined by examining all of the circumstances of a particular situation. Various factors will need to be considered including:

- the terms of the engagement between a registered agent and their client
- the complexity of the transaction that is subject to the advice
- the client's circumstances, including their level of sophistication (such as education standard and level of tax knowledge in the area which is the subject of advice)
- the nature of any pre-existing relationship between the registered agent and their client.

## Consequences for failing to comply with Code Item 10

20. If a registered agent does not take reasonable care to ensure that taxation laws are applied correctly under Code Item 10, the TPB may find that the registered agent has breached the Code and may impose sanctions for that breach.

21. If a registered agent breaches the Code, the TPB may impose one or more of the following sanctions:

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

## Practical examples involving Code Item 10

22. The following are indicative examples which illustrate the general application of Code Item 10. In all cases, consideration will need to be given to the specific facts and circumstances as well as to the taxation laws as applied to those facts.

### **Example 1**

#### Terms of engagement

Brooke runs a boutique wine bar and prepares her own accounts. She engages Danny, a registered BAS agent, to provide advice and prepare and lodge her BAS.

#### Brief description of scenario

Brooke bought some bar stools for her new house but has claimed the cost of the stools as a business expense in her accounts. Brooke advises Danny that she wishes to claim a GST credit for the cost of the bar stools, even though the bar stools were purchased for private use.

#### Reasonable care steps

To comply with his obligations under Code Item 10, Danny must take reasonable care to ensure that taxation laws are applied correctly to the circumstances in relation to which he is providing advice to Brooke.



Danny considers the business expenses that Brooke wishes to claim and determines that the GST credit for the bar stools cannot be claimed in the circumstances and confirms that the BAS will be prepared on this basis. By taking these steps, Danny has complied with his obligations under Code Item 10.

Alternative Scenario

Brooke insists that Danny claim the GST credit for the bar stools and prepare and lodge the BAS on this basis. Danny should consider declining to act for Brooke in this matter to avoid breaching his obligations under the Code, in addition to relevant civil penalty provisions.<sup>4</sup>

**Example 2**

Terms of engagement

Ami Pty Ltd engages Sarah, a registered tax agent, to help her claim the current Research and Development (R&D) tax incentive.

Brief description of scenario

Sarah is not familiar with the current R&D tax incentive rules. Although Sarah has previously advised on the R&D tax concessions (which have been replaced with the R&D tax incentive recently), she is not a specialist in the area of taxation law and has not updated her knowledge of the new rules at this time.

Reasonable care steps

To comply with her obligations under Code Item 10, Sarah must take reasonable care to ensure that taxation laws are applied correctly to the circumstances in relation to which she is providing advice to Ami Pty Ltd.

Sarah recognises that she does not have the requisite skills and knowledge to advise Ami Pty Ltd about the R&D tax incentive and seeks assistance from another registered tax agent, Ryan, who Sarah knows specialises in R&D. Sarah confirms this arrangement with Ami Pty Ltd. By taking these steps, Sarah has complied with her obligations under Code Item 10.

Alternative Scenario

If Sarah decided not to seek assistance from another registered tax agent with the requisite specialist R&D skills and knowledge and instead advised Ami Pty Ltd about the R&D tax incentive based on her limited knowledge of the previous rules (and without undertaking her own research about the relevant subject matter), she will most likely have breached her obligations under Code Item 10.

Similarly, if the terms of the engagement between Sarah and Ami Pty Ltd were such that Sarah was to spend a specified amount of time which she considered to be insufficient to complete this work, Sarah should consider declining to act for the client in this matter to avoid breaching her obligations under Code Item 10.

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<sup>4</sup> For example, see section 50-20 of the *Tax Agent Services Act 2009* regarding making false or misleading statements.



### Example 3

#### Terms of engagement

Bob is a property developer and engages Julie, a registered tax agent, to provide GST related tax advice, including in relation to the application of the margin scheme.

#### Brief description of scenario

Julie specialises in GST-related advisory work. However, she does not have an in-depth understanding of the rules relating to the margin scheme.

#### Reasonable care steps

To comply with her obligations under Code Item 10, Julie must take reasonable care to ensure that taxation laws are applied correctly to the circumstances in relation to which she is providing advice to Bob.

As Julie's experience and knowledge of the rules relating to the margin scheme is limited, she refers to the relevant legislation, case law and publications by the ATO (including the Commissioner's views as expressed in relevant rulings and determinations). Julie may also refer to colleagues or other experts. Julie then applies this research in providing her advice to Bob.

In this case, Julie has complied with her obligations under Code Item 10 to take reasonable care to ensure that taxation laws are applied correctly by undertaking the necessary research prior to providing her advice to Bob.

#### Alternative Scenario

If Julie relied upon her existing limited knowledge of the margin scheme to advise Bob, she will most likely have breached her obligations under Code Item 10 as she has not taken reasonable care to ensure the correct application of the law to Bob's circumstances.

### Example 4

#### Terms of engagement

Sunshine Solar Pty Ltd engages Kevin & Green, a large accounting firm and registered tax agent, to provide advice on the taxation implications relating to the importation of certain solar panels.

#### Brief description of scenario

Sunshine Solar Pty Ltd advises Kevin & Green that it has already received advice from Paul Partners, another registered tax agent, regarding the taxation implications relating to the importation of the solar panels. Sunshine Solar Pty Ltd provides Kevin & Green with a copy of the advice from Paul Partners and advises Kevin & Green that it wants a second opinion.

#### Reasonable care steps

To comply with its obligations under Code Item 10, Kevin & Green must take reasonable care to ensure that taxation laws are applied correctly to the circumstances in relation to which it is providing advice to Sunshine Solar Pty Ltd.



**Australian Government**



**TAX PRACTITIONERS BOARD**

To ensure that taxation laws are applied correctly, Kevin & Green obtains relevant source documentation from Sunshine Solar Pty Ltd and undertakes the necessary research in relation to the relevant taxation laws. Kevin & Green determines that there are two views in relation to the application of the relevant taxation laws but considers that the more correct view is the same as that contained in the advice from Paul Partners.

Kevin & Green advises Sunshine Solar Pty Ltd that its advice is likely to be the same as that provided by Paul Partners.

In this case, Kevin & Green has complied with its obligations under Code Item 10 to take reasonable care to ensure that taxation laws are applied correctly.