

ATO RECEIVABLES POLICY

PART G Penalties and Interest Relating to Receivables Activity

Chapter 98 PENALTIES FOR FAILING TO LODGE DOCUMENTS ON TIME

The policy in this chapter is to be followed by Tax Office staff. We have made every effort to ensure it is technically accurate, but in the interests of clarity it has been written in 'plain English' and should not be read or interpreted like legislation. If you feel that something in the chapter is wrong or misleading, please advise the Tax Office.

Date of effect: 24 July 2008 (This version replaces the 2006 version.)

Key legislation: Division 286 and Division 298 of Schedule 1 to the *Taxation Administration Act 1953*

PURPOSE

1. This chapter deals with lodgment penalties which are imposed on returns, notices, statements or other documents (referred to collectively in this chapter as 'documents') due after 1 July 2000.

The purpose of this chapter is to:

- explain how the Commissioner may apply lodgment penalties
- explain when the Commissioner will remit lodgment penalties, and
- outline objection and appeal rights.

This chapter should be read in conjunction with Chapter 51 'Introduction to Part C – Lodgment of documents'.

INTRODUCTION

2. Over the years, various Acts administered by the Commissioner have imposed specific additional amounts for the late lodgment of documents. Additional taxes or penalties such as 'additional tax for late lodgment, 'late lodgment penalty interest,' 'late lodgment penalty', 'general interest charge' (GIC) and 'failure to lodge on time penalty' have applied when a document has not been lodged by the due date.
3. Additional tax for late lodgment (ATLL) is imposed where an income tax return in respect of the 1995 year of income or earlier years is lodged late. The Commissioner would normally remit part of the additional tax statutorily imposed, having regard to whether the lodgment was made voluntarily and the tax payable.
4. Late lodgment penalty (LLP) and/or late lodgment penalty interest (LLPI) is imposed where an income tax return in respect of the year of income ending 30 June 1996 or subsequent years returns up to 30 June 1999 is lodged late. The application of the LLP is made having regard to whether the lodgment was made voluntarily and the entity type. The GIC replaces the penalty interest component where the return(s) are lodged after 1 July 1999.

5. Penalties for failing to lodge documents on time or in the approved form (FTL penalty) are imposed on documents with a due date on or after 1 July 2000 (except for fringe benefits tax (FBT), in which it applies for the year beginning 1 April 2001 and later years). The amount of penalty is calculated using a base penalty amount, which is one penalty unit for every 28 days (or part thereof) that the document is late, up to a maximum of 5 penalty units. The base penalty amount will be increased if the entity is a medium or large entity.
6. The amount of FTL penalty is based upon the period of time that an approved form is outstanding. It is not dependent upon any tax assessed, tax payable or unpaid amounts. This makes the FTL penalty distinguishable from other penalties and charges, such as GIC or LLPI.
7. Objection and appeal rights will exist where the Commissioner refuses to any extent to remit the FTL penalty, and the amount of the penalty remaining is more than 2 penalty units.
8. The policy principles outlined in this chapter, and in Taxation Rulings IT 2214 and IT 2372 should be considered in decisions made in respect of ATLL and LLP. Decisions in relation to LLPI should be made with regard to the policy principles outlined in Chapter 93 'General interest charge'

POLICY

Application of FTL penalty

9. The law imposes a penalty if a document is not lodged in the approved form by the due date. However, the penalty does not become payable until the Commissioner gives written notice of the liability to pay the penalty, and the reasons why the taxpayer is liable to pay the penalty.
10. Notification of the penalty may be made either before lodgment of the late document or following lodgment of the late document. If the taxpayer is notified of the penalty before the lodgment of the relevant document, the Commissioner may later increase the penalty up to the date the document is lodged in the approved form (to the statutory maximum).
11. At law, FTL penalty applies separately to each lodgment or notification of a tax related liability. However, where separate obligations are required to be reported on the one document, for example, on an activity statement, generally **only one** FTL penalty will be applied to the document.
12. Broadly, the Tax Office's policy is that a penalty will be applied if a document is not lodged in the approved form by the due date, and it:
 - (i) **places the efficient operation of the taxation system at risk or**
 - (ii) **provides a significant benefit or advantage to the late or non lodger over the general community, or**
 - (iii) **erodes community confidence in the taxation system.**
13. Examples of the policy described in the previous paragraph include:
 - (i) revenue collections are often contingent on timely lodgments
 - (ii) pay as you go (PAYG) withholding annual reports reconcile amounts withheld from employees
 - (iii) large entities may gain cash flow advantages by delaying lodgment (by delaying updates to PAYG instalment rates)

- (iv) information from large entities is valuable to the Tax Office in managing compliance risks
 - (v) the community expects penalties to be administered fairly, with those who avoid reporting on time sanctioned, and those who are trying to do the right thing given reasonable opportunity to comply.
14. The Commissioner seeks to apply lodgment penalties in such a way that it will positively influence lodgment behaviours.
15. In deciding whether to apply FTL penalty the Commissioner will have regard to:
- (i) the compliance history of the taxpayer
 - (ii) the effort taken by the Tax Office to obtain lodgment
 - (iii) the value of the information required
 - (iv) whether the taxpayer has had an opportunity to comply
 - (v) whether the taxpayer is aware of their lodgment obligation and the consequences of not meeting that obligation
 - (vi) any contact the taxpayer may have had with the Tax Office prior to the due date for lodgment
 - (vii) the length of time the document was overdue
 - (viii) the likelihood that application of FTL penalty will improve on time lodgment behaviour.
16. The Commissioner may use an automated system to apply an FTL penalty to documents which are lodged late. A series of filters are applied to account for short delays in postal or transmission, to exclude low value documents such as refunds, and to ensure one-off mistakes are not penalised.
17. The Commissioner may also apply penalty for non lodgment by:
- (i) using an automated system after the due date to apply penalty to the outstanding documents of selected groups of taxpayers
 - (ii) tax officers applying penalty after the lodgment due date to unlodged documents on a cases by case basis.
18. In applying FTL penalty, the Commissioner must determine the 'size' of the entity at the time a document is required to be lodged, as the base penalty amount is increased if the entity is a medium or large entity. This requirement means that the Tax Office, in certain circumstances, may need information that is not currently available within its operating systems. For example, to use the 'assessable income test' to determine the 'size' of an entity, we need to know the assessable income of the entity for the current financial year. This is not possible where the entity has not lodged its income tax return for that year.
19. If information is not readily available, it will not always be possible to apply more than one of the three size tests available within the law. Consequently, the Commissioner will generally use the client's withholder status to determine an entity's size. Where a client does not have a withholder status, the base penalty amount will not be increased.
20. GIC will apply to any FTL penalty which remains unpaid after the due date for payment. Remissions for any GIC applied will be in accordance with the policy outlined in Chapter 93 'General interest charge'.

Consolidations

21. The head company of a consolidated group is required to lodge two activity statements – one for the consolidated PAYG instalment of the group, and the other for any other obligations it may have in its own right (goods and services tax (GST), FBT instalments etc). The application of FTL penalty applies to both these activity statements separately.
22. FTL penalty will not apply to a notice of choice to consolidate. In order for a group to consolidate, the head company of a consolidated group is required to lodge a notice of choice to consolidate, prior to or at the time of lodgment of the consolidated income tax return. If the head company does not give the notice of choice to consolidate by the time it lodges the consolidated income tax return, it cannot be treated as a consolidated group unless the Commissioner grants a deferral of time to lodge the notification.

Remission of FTL penalty

23. The Commissioner has discretion to remit FTL penalty in full or in part, depending on the circumstances that led to the failure to lodge on time.
24. A decision on a request for remission of penalty will be made having regard to:
 - (i) the facts of each individual case including:
 - a information provided by the taxpayer or their tax agent, and
 - b any other information available to the Commissioner.
 - (ii) the taxpayers' charter and the compliance model
 - (iii) Chapter 1 'Principles underlying the ATO Receivables Policy', and
 - (iv) the policy guidelines contained in this chapter.
25. Where the Commissioner is satisfied that a remission of penalty is warranted, either in full or in part, it will be remitted.
26. Full remission of FTL penalty will be granted where the taxpayer or their tax agent can establish that circumstances beyond their control existed which reasonably impacted on their ability to lodge the document on time.
27. Generally, FTL penalty will only be remitted after the outstanding document has been lodged.

Requests for remission

28. A taxpayer is entitled to request a remission of FTL penalty.
29. Requests for remission should fully outline the reasons for the delay in lodgment and the steps the taxpayer has taken to lodge the overdue documents.
30. The Tax Office may ask for the remission request to be made in writing. This would be likely where:
 - (i) the document at the time of making the remission request is still outstanding or
 - (ii) the penalty has been applied on an unlodged document as a result of compliance action or

- (iii) the information provided verbally does not clearly demonstrate the circumstances which led to the late lodgment, or
 - (iv) it is considered necessary in order for the Commissioner to make an informed decision.
31. All of the facts put forward by the taxpayer in their request for remission of FTL penalty will be considered, their effect upon late or non-lodgment and any steps taken to alleviate the delay in lodgment.

Reasons for remission

32. Remission of FTL penalty will be granted where the delay in lodgment occurred due to **circumstances beyond the control of the taxpayer**.
33. Where circumstances beyond one's control do not exist, it may still be appropriate for the Commissioner to remit the FTL penalty, in full or in part, where it would be **fair and reasonable** to do so.

Circumstances beyond the control of the taxpayer

34. A taxpayer (or their tax agent) may be able to demonstrate that the difficulties they are experiencing were due to factors beyond their control and clearly could not be predicted and the taxpayer or their tax agent was not in a position to request further time to lodge.

Such circumstances may include, but are not limited to:

- natural disasters, or
- the serious illness of the taxpayer or their tax agent, if a sole practitioner.

Fair and Reasonable

35. A decision by the Commissioner to remit penalty because it is fair and reasonable must be considered in view of the legislative intent that taxpayers should be liable to a penalty if they lodge late.
36. Taxpayers will need to demonstrate that it is fair and reasonable to remit the penalty, having regard to the nature of the specific event or decision.
37. A decision to remit penalty must be fair to the taxpayer concerned, and also fair to the whole community. In other words a taxpayer who habitually lodges late or fails to lodge should not be given any undue advantage over those taxpayers who organise their affairs to ensure they can lodge on time.
38. For example, a client who has a good compliance history is considered low risk, and it would be fair to remit the penalty.
39. It would be inappropriate to remit FTL penalty:
- (i) as an inducement to encourage payment of debts
 - (ii) to finalise a case where the Tax Office has not attempted to collect outstanding amounts, or
 - (iii) where the reasons provided by the taxpayer are only remotely linked to the late or non-lodgment.

40. General reasons such as adverse business conditions affecting an industry or general economic downturn would not be an acceptable basis for remission as these factors are more likely to affect ability to pay and prevail across the whole community. Taxpayers would need to demonstrate that such factors had specific impacts on their ability to lodge before they could be considered as sufficient to warrant remission of the FTL penalty.

Objection and Appeal Provisions

41. Where the Commissioner decides not to remit an amount of FTL penalty, either in part or in full, the taxpayer must be advised in writing, of the decision, the reasons for the decision, and their objection rights.
42. An objection may be made if the Commissioner has refused, to any extent, to remit a penalty amount and the penalty amount that remains payable after the refusal is more than 2 penalty units.
43. If a taxpayer is dissatisfied with an objection decision by the Commissioner, the taxpayer may:
- (i) apply to the **Administrative Appeals Tribunal (AAT)** for review of the objection decision – an application to the AAT is required to be lodged within 60 days of service of the notice of the objection decision on the taxpayer (an application fee is payable). The taxpayer may apply for an extension of time if it is required, or
 - (ii) appeal to the **Federal Court** against the objection decision – an appeal to the Federal Court is required to be lodged within 60 days of service of the notice of the objection decision on the taxpayer. Generally, a filing fee, a setting down fee and a daily hearing fee are payable. There is no provision for an extension of time when lodging an appeal with the Federal Court.
44. Where a decision not to remit a penalty cannot be reviewed by objection (that is, the amount of penalty that remains payable after the refusal to remit is 2 penalty units or less) the taxpayer may seek a review of the decision under the *Administrative Decisions (Judicial Review) Act 1977*.

TERMS USED

Activity statement – a form that allows the taxpayer or representative to report obligations for GST, luxury car tax (LCT), wine equalisation tax (WET), PAYG withholding, PAYG instalments, FBT instalments and fuel tax credits (FTC)

Approved form – a form that has been approved by the Commissioner as acceptable to provide information required by the Tax Office. An example of an approved form is any income tax return or activity statement. Law Administration Practice Statement PS LA 2005/19 outlines how a form becomes an approved form and what is required to be in it

Base Penalty Amount – takes the meaning set out in subsection 286-80(2) of Schedule 1 to the TAA. It is imposed for each period of 28 days or part thereof that an approved form remains outstanding after its due date for lodgment (up to a maximum of 5 penalty units)

Business activity statement – a personalised form lodged by those taxpayers who have an obligation to lodge an activity statement and have a GST role as well as other obligations such as WET, LCT, PAYG instalments, PAYG withholding, FBT instalments and FTC. A BAS must be lodged with the Tax Office for each tax period.

Current annual turnover – takes the meaning set out in section 195-1 of the *A New Tax System (Goods and Services Tax) Act 1999* and is the sum of the values of all supplies made during the year, other than certain exclusions. This term is contained in one of the tests used to determine if the base penalty amount is to be multiplied by a factor of 2 or 5.

Due date for lodgment – the date by which documents must be lodged with the Commissioner

Head Company – of a consolidated group must be an Australian resident and beneficially owns all of the membership interests in at least one other company. It is further defined in sec 703-15 of the ITAA 1997.

Instalment activity statement – a personalised form issued by the Tax Office for reporting tax obligations to be lodged by taxpayers who are either not registered or required to be registered for GST, or who are not required to report GST in a particular period, but may have other reporting obligations

Large withholder – takes the meaning set out in sections 16-95 and 16-125 of Schedule 1 to the TAA and is generally an entity where amounts withheld (or who is part of a wholly owned group of companies and the amount withheld by those companies) exceed \$1 million annually being required to report and pay within 6-9 days of withholding.

Lodgment penalties – for the purposes of this chapter means failure to lodge on time penalty.

Medium withholder – takes the meaning set out in sections 16-100 and 16-135 of Schedule 1 to the TAA and is generally an entity where amounts withheld are greater than \$25,000 and up to and including \$1 million. Medium withholders are required to remit and report on a monthly basis withheld amounts, by the end of the 21st day of the next month.

PAYG withholding – is the system whereby payers withhold amounts from payments to payees and report and pay the withheld amounts to the Tax Office.

Penalty unit – the unit upon which the base penalty amount is calculated for failing to lodge documents on time in accordance with Subdivision 286-C of Schedule 1 to the TAA. The value of a penalty unit can be determined by reference to section 4AA of the *Crimes Act 1914* and is currently \$110.

Relevant entity – in relation to a year of income, includes:

- (i) a company, or
- (ii) any person in the capacity of a trustee of:
 - a a fund that is an eligible ADF in relation to that year of income: or
 - b a fund that is an eligible superannuation fund in relation to that year of income; or
 - c a unit trust that is a pooled superannuation trust in relation to that year of income.

Taxation Law – takes the meaning set out in subsection 995-1(1) of the *Income Tax Assessment Act 1997*, and is an Act of which the Commissioner has general administration, or regulations under such an Act.

Chapter 98 - Archived version

Version 4 – July 2006 (will link to chapter 98 pdf)
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