

## 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 ATO 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 ATO.*

**Date of effect:** 1 October 2010

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

## PURPOSE

1. This chapter deals with lodgment penalties which may be imposed where entities<sup>1</sup> are required to give a return, notice, statement or other document to the Commissioner in the approved form by a particular day and fail to do so. Returns, notices, statements or other documents are referred to collectively in this chapter as 'documents'.

The purpose of this chapter is to:

- explain how the Commissioner may apply failing to lodge on time (FTL) penalty
- explain when the Commissioner will remit FTL penalty
- explain when a safe harbour exemption may be applied
- outline objection and appeal rights.

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

## INTRODUCTION

2. FTL penalty is based upon the period of time that an approved form is overdue. It is not dependent upon any tax assessed, tax payable or unpaid amounts. This makes FTL penalty distinguishable from other penalties and charges such as the general interest charge (GIC).
3. The amount of FTL 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.

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<sup>1</sup> Entity includes an individual

4. Objection and appeal rights will exist where the entity is dissatisfied with the Commissioner's decision regarding remission of the FTL penalty and the penalty remaining is more than 2 penalty units.

## **POLICY**

### ***Application of FTL penalty***

5. 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 entity is liable to pay the penalty.
6. Notification of the penalty may be made either before lodgment of the late document or following lodgment of the late document. If the entity 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).
7. 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.
8. Broadly, our 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 and superannuation systems at risk
  - (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 and superannuation systems.
9. Examples of the considerations underlying this 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 ATO in managing compliance risks
  - (v) the community expects penalties to be administered fairly, with those who avoid reporting on time being penalised, and those who are trying to do the right thing given reasonable opportunity to comply.
10. The Commissioner seeks to apply FTL penalty in such a way as to positively influence lodgment behaviours.
11. In deciding whether to apply FTL penalty the Commissioner will have regard to:
  - (i) the compliance history of the entity
  - (ii) the effort taken by the ATO to obtain lodgment
  - (iii) the value of the information required

- (iv) whether the entity has had an opportunity to comply
  - (v) whether the entity is aware of their lodgment obligation and the consequences of not meeting that obligation
  - (vi) any contact the entity, or their registered tax or BAS agent may have had with the ATO 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.
12. The Commissioner uses an automated system to apply FTL penalty to documents, which are lodged late. The automated system uses a system of filters to exclude documents and entities which represent a low risk. The system accounts for short postal service or transmission delays.
13. The Commissioner may also apply FTL penalty to overdue documents using a manual process:
- (i) in cases that are excluded from the automated system
  - (ii) on documents that remain overdue
  - (iii) in situations of escalating non-compliance, or
  - (iv) to high risk entities.
14. In applying FTL penalty, the Commissioner must determine the 'size' of the entity at the time a document is required to be lodged. The base penalty amount is increased if the entity is a medium or large entity.
15. The Commissioner will not always have the current information available to determine the correct size of an entity in accordance with the size tests as prescribed in 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 large or medium withholder status and there is no evidence on hand justifying a higher rate, then the base penalty is applied.
16. GIC will apply to any FTL penalty which remains unpaid after the due date for payment. Remissions of any GIC applied will be in accordance with the policy outlined in Chapter 93 'General interest charge'.
17. In certain circumstances an entity is not liable to pay the FTL penalty, as a safe harbour exemption may apply where the document had a due date for lodgment of 1 March 2010 or later and all the following apply:
- (i) the entity engaged a registered tax agent or BAS agent to lodge the document
  - (ii) the entity provided all relevant information to the agent to enable the document to be lodged on time
  - (iii) the failure to lodge on time was not due to either:
    - intentional disregard of a taxation law by the agent, or
    - recklessness by the agent as to the operation of a taxation law.
18. To rely on this safe harbour exemption, the entity has to prove that they gave all relevant information in sufficient time to their agent so that the document could be given to the Commissioner by the due date for lodgment.

19. The Commissioner will generally not consider a request for a safe harbour exemption until:
  - (i) the document is actually lodged
  - (ii) an FTL penalty has been applied to the entity's account, and
  - (iii) the agent who lodged the document has been given an opportunity to comment on the entity's claim.
20. There are no objection rights attached to the safe harbour exemption. Where the Commissioner determines that the safe harbour exemption does not apply, the entity can seek a review of that decision under the *Administrative Decision (Judicial Review) Act 1977*.
21. Where the Commissioner determines that the safe harbour exemption does not apply, the Commissioner may consider whether a remission of the FTL penalty is warranted.

### ***Remission of FTL penalty***

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

### ***Requests for remission***

27. An entity is entitled to request a remission of FTL penalty.
28. Requests for remission should fully outline the reasons for the delay in lodgment and the steps the entity has taken to lodge the overdue documents.
29. We 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

- (ii) the penalty has been applied on an unlodged document as a result of compliance action
- (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.

### ***Reasons for remission***

- 30. Remission of FTL penalty will be granted where the delay in lodgment occurred due to **circumstances beyond the control of the entity**.
- 31. Where circumstances beyond their 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 entity***

- 32. An entity (or their agent) may be able to demonstrate that the difficulties they experienced were due to factors beyond their control and clearly could not be predicted and the entity or their agent was not in a position to request further time to lodge.
- 33. Such circumstances may include, but are not limited to:
  - natural disasters, or
  - the serious illness of the entity or their agent, if a sole practitioner.

### ***Fair and reasonable***

- 34. A decision by the Commissioner to remit penalty because it is fair and reasonable must be considered in view of the legislative intent that entities should be liable to a penalty if they lodge late.
- 35. Entities 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.
- 36. A decision to remit penalty must be fair to the entity concerned, and also fair to the whole community. In other words an entity who habitually lodges late or fails to lodge should not be given any undue advantage over those entities who organise their affairs to ensure they can lodge on time.
- 37. For example, it would generally be fair to remit the penalty where a client has a good compliance history.

### ***Objection and appeal provisions***

- 38. Where the Commissioner decides not to remit an amount of FTL penalty, either in part or in full, the entity must be advised in writing, of the decision, the reasons for the decision, and their objection rights.
- 39. If the Commissioner has refused to remit in full or in part a penalty amount and the entity is dissatisfied with the decision, an objection may be made if the penalty amount that remains payable after the refusal is more than 2 penalty units.

40. If an entity is dissatisfied with an objection decision by the Commissioner, the entity may:
- (i) apply to the **Administrative Appeals Tribunal (AAT)** for review of the objection, or
  - (ii) appeal to the **Federal Court** against the objection decision.
41. Where a decision not to remit a penalty cannot be reviewed by objection (for example, if the amount of penalty that remains payable after the refusal to remit is 2 penalty units or less) the entity may seek a review of the decision under the *Administrative Decisions (Judicial Review) Act 1977*.

## TERMS USED

Activity statement – an approved form that allows the entity 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 ATO. 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).

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

Large withholder – takes the meaning set out in section 16-95 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, lodgment penalties means failure to lodge on time penalty.

Medium withholder – takes the meaning set out in section 16-100 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 – under this system payers withhold amounts from payments to payees and report and pay the withheld amounts to the ATO.

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.

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 versions**

Version 4 – July 2006 (will link to chapter 98 pdf)
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Version 5 – August 2008 (will link to chapter 98 pdf)
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