

ATO RECEIVABLES POLICY

PART G Penalties and Interest Relating to Receivables Activity

Chapter 100 PAYG WITHHOLDING NON-REGISTRATION PENALTY

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: Sub-division 16BA of the *Taxation Administration Act 1953*

PURPOSE

(This chapter should be read in conjunction with the Chapter 91 'Introduction to Part G – Penalties and interest relating to receivables activities'.)

1. This chapter deals with:
 - the requirement to register as a withholding entity
 - the ability of entities to register branches
 - the penalty that applies to an entity that does not register as required, and
 - the remission of penalties for non-registration.
2. The penalty may be remitted in appropriate circumstances – section 298-20 of Schedule 1 to the *Taxation Administration Act 1953* (TAA). If the Commissioner refuses to remit all of the penalty or only remits part of it, written notice of the decision must be given to the entity. Where the amount of penalty payable, after the refusal to remit any part of it, is more than 2 penalty units then the entity may object under Part IVC.
3. The Commissioner may register an entity or cancel the registration at any time - section 16-141 of the TAA.
4. The Commissioner may also register a branch of an entity if:
 - the entity applies, in the approved form, for registration of the branch
 - the entity has an Australian Business Number (ABN) or has applied for one
 - the Commissioner is satisfied that the branch maintains an independent system of accounting, and can be separately identified by reference to:
 - a the nature of the activities carried on through the branch; or
 - b the location of the branch, and
 - the Commissioner is satisfied that the entity is carrying on an enterprise through the branch, or intends to carry on an enterprise through the

branch, from a particular date specified in the application - section 16-142 of the TAA.

A branch that is so registered is a pay as you go (PAYG) withholding branch.

5. While a branch or branches of an entity may be registered, the entity remains legally responsible for all amounts that relate to its branch/es.
6. The effect of registering a branch or branches is that the amounts to be paid to the Commissioner are worked out as if the branch were a separate entity and as if:
 - all payments made through the branch, from which amounts are required to be withheld under Division 12, were made by that separate entity and
 - all alienated personal services payments received through the branch, in respect of which Division 13 requires an amount to be paid to the Commissioner, were received by that separate entity, and
 - all non-cash benefits provided through the branch, in respect of which Division 14 requires an amount to be paid to the Commissioner, were provided by that separate entity – section 16-143 of the TAA.
7. The Commissioner must cancel the registration of a PAYG withholding branch if it fails to meet the conditions of registration in relation to:
 - an independent system of accounting
 - separate identification by reference to the nature of the activities carried on through the branch, or the location of the branch, and
 - carrying on an enterprise through the branch - section 16-144 of the TAA.
8. The effect of cancelling an entity's registration is that, the registration of the PAYG withholding branch of the entity ceases to have effect - section 16-145 of the TAA.

INTRODUCTION

9. Subdivision 16-BA of Schedule 1 to the TAA, requires the registration of an entity that is required to withhold an amount under Division 12 or make a payment under Divisions 13 and 14. A penalty of 5 penalty units applies to an entity that doesn't register by the time specified.
10. Division 298 of the TAA outlines the "machinery provisions" for notification and remission of this penalty.
11. The provisions under which a withholding payment may be made are:

Summary of withholding payments		
Item	Withholding payment	Section
	A payment of salary etc to an employee	12-35
	A payment of remuneration to the director of a company	12-40
	A payment of salary etc to an office-holder (for example a member of the Defence Force)	12-45
	A payment to a religious practitioner	12-47
	A return to work payment to an individual	12-50
	A payment that is covered by a voluntary agreement	12-55
	A payment under a labour hire arrangement or a payment specified by regulations	12-60

Summary of withholding payments		
Item	Withholding payment	Section
	A payment of pension or annuity	12-80
	An eligible termination payment	12-85
	A payment for unused leave on an individual's retirement or termination of employment	12-90
	A social security or similar payment (for example age pension)	12-110
	A Commonwealth education or training payment	12-115
	A compensation, sickness or accident payment	12-120
	A payment arising from an investment where the recipient does not quote its tax file number, or in some cases, its ABN	12-140
	Investor becoming presently entitled to income of a unit trust	12-145
	A payment for a supply where the recipient of the payment does not quote its ABN	12-190
	A dividend payment to an overseas person	12-210
	A dividend payment received for a foreign resident	12-215
	An interest payment to an overseas person	12-245
	An interest payment received for a foreign resident	12-250
	An interest payment derived by a lender in carrying on business through overseas permanent establishment	12-255
	A royalty payment to an overseas person	12-280
	A royalty payment received for a foreign resident	12-285
	A departing Australia superannuation payment	12-305
	A payment (of a kind set out in the regulations) to a foreign resident	12-315
	A payment (of a kind set out in the regulations) received for a foreign resident	12-317
	A mining payment	12-320
	A natural resource payment	12-325

12. Subdivision 16-BA also enables the registration of branches of an entity provided it meets certain requirements regarding operational independence. The registration of the branch must be cancelled if and when it no longer meets those requirements.
13. The effect of registering a branch or branches is that the branches must account for the amounts withheld under Division 12 or paid under Divisions 13 and 14 as if they were a separate entity. However, the entity remains legally liable for the notification and payment of these amounts by its branch/es.

POLICY

Allowing further time to register

14. The legislation enables the Commissioner to allow a longer period in which to apply for registration.
15. The circumstances in which a further period for registration will be allowed are limited. It can generally be expected that a further period will be granted where the taxpayer can show that the inability to register on time can be directly attributed to:

- natural disasters (flood, fire, drought, earthquake and the like); or other disasters that may have, or have had, a significant impact on a taxpayer or region or
 - the serious illness of the taxpayer where there is no other person that could register; or in some instances, the advanced age of a taxpayer, the serious illness of a family member or a language problem may be considered as an extenuating circumstance.
16. In all cases where a further period is being sought, the onus is on the taxpayer, or their representative, to satisfy the Commissioner that:
- the inability to register by the required date is/was directly caused by the circumstances that were beyond their control and
 - once the circumstances are/were under control, registration will occur/occurred.
17. Generally, requests for a further period to register should be applied for before the due date for registration but each case will be considered on its merits.

Remission of penalties

18. The Commissioner may remit part or all of the penalty for non-registration.
19. Legislation does not specifically identify the circumstances where the Commissioner may exercise a discretion to remit the penalty. Penalty may be remitted, however, if the Commissioner is satisfied:
- (i) the circumstances that contributed to the delay in registration were not due to, or caused directly or indirectly by, an act or omission of the entity and the entity has taken reasonable action to relieve, or relieve the effects of, those circumstances and has registered
 - (ii) the circumstances that contributed to the delay in registration were due to, or caused directly or indirectly, by an act or omission of the entity and the entity has taken reasonable action to relieve, or relieve the effects of, those circumstances
 - (iii) having regard to the nature of those circumstances, it would be fair and reasonable to remit the penalty, or
 - (iv) there are special circumstances by reason of which it would be fair and reasonable to remit penalty.
20. Where entities seek a remission of penalty, the entity's request should be considered having regard to:
- the facts of each individual case
 - Chapter 1 'Principles underlying the ATO Receivables Policy', and
 - the policy guidelines contained in this chapter.
21. It would be inappropriate to exercise the discretion to remit penalty for the following reasons:
- as an inducement to register
 - as an inducement to encourage payment of debts
 - as an inducement to finalise a disputed assessment, or

- to finalise a case where the Tax Office has not attempted to collect penalty.
22. An entity has a right to request a remission of penalty however the onus is on the entity to demonstrate that remission is warranted.
 23. A decision on the request for remission will be made based upon information provided by the entity as part of the request for remission and from any other information available to the Commissioner, including information about the entity's compliance history. The Commissioner will not remit any penalty if there is insufficient relevant information to make a decision.
 24. The Commissioner will consider all of the factors put forward by an entity in the request for remission, and the steps taken to alleviate the delay in registration. Remission would not be considered if the entity were to rely on general grounds for the request, nor would it be considered if the entity were to rely on factors that could only be remotely linked to the late registration.

Factors beyond the control of the entity

25. General statements such as ignorance of the law or other business or personal commitments would not be an acceptable basis for remission under this heading as these factors are more likely to prevail across the whole community.

Acts or omissions of the entity

26. Acts or omissions of the entity which prevent registration by the due date will vary. In considering remission of penalty, it is necessary to determine whether the delay in registration was caused by the entity's direct involvement or otherwise and what steps were taken, if any, to relieve the effects of the circumstances causing the late registration.

Relieving the circumstances or effects of circumstances

27. The Commissioner must consider the entity's efforts to relieve all of the circumstances that led to late registration, irrespective of whether the circumstances were subject to, or beyond, the entity's control. To be eligible for remission, the entity would be expected to have taken all reasonable action possible, including registering as soon as the error came to their attention.

Fair and reasonable

28. A decision by the Commissioner to remit penalty because it is fair and reasonable must be considered in view of the legislative policy that entities should be liable to penalties if they do not register or register late. Not only must the exercise of the power to remit be fair to the entity concerned, it must be fair to the whole community.

Good compliance history

29. An entity with a good compliance record may be late in registering. In deciding whether to remit the penalty in whole or in part, the Commissioner will take the good compliance history, and any other relevant factors of the entity into account when making such a decision.

TERMS USED

Approved form – has the meaning as outlined in section 388-50 of the TAA.

Entity – means any of the following:

- a company
- a partnership
- a person in a particular capacity of trustee
- a body politic
- a corporation sole
- any other person.

PAYG withholding branch – means a branch registered under section 16-142 of the TAA.
(Note: A branch may be both a PAYG withholding branch and a GST branch).

Penalty Unit – is a unit of penalty, whose value is defined under section 4AA of the *Crimes Act 1914*.

Chapter 100 - Archived version

Version 4 – July 2006 (will link to chapter 100 pdf)
