TR 96/D21 - Income tax: RPS, PAYE and PPS: remission of penalty for failure to deduct

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This document has been finalised by TR 97/8.

Draft Taxation Ruling
Income tax: RPS, PAYE and PPS: remission of penalty for failure to deduct

other Rulings on this topic

IT 2172; IT 2210; IT 2211; IT 2246

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Draft Taxation Rulings (DTRs) represent the preliminary, though considered, views of the Australian Taxation Office.

DTRs may not be relied on by taxation officers, taxpayers and practitioners. It is only final Taxation Rulings which represent authoritative statements by the Australian Taxation Office of its stance on the particular matters covered in the Ruling.

What this Ruling is about

1. Persons making payments (payers) that fall within the ambit of the Reportable Payments System (RPS), the Pay As You Earn system (PAYE) or the Prescribed Payments System (PPS) have a number of obligations under income tax law. Foremost among these obligations are the responsibilities to deduct tax and to pay these deductions to the Commissioner of Taxation (the Commissioner).

Class of person/arrangement

2. This Ruling explains the circumstances under which a payer may become liable for administrative penalties for failing to deduct amounts as required and sets out guidelines for the remission of the amount of penalty to be imposed.

3. In this Ruling:

- some terms have specific meanings which are explained in a Glossary at the end of the Ruling. These terms will appear in **bold text** when they are first mentioned;
- 'income tax law' refers to the *Income Tax Assessment Act 1936* (the Act) and Regulations under the Act, and incorporates the *Taxation Administration Act 1953* (TAA);
- references to sections and subsections relate to the Act unless otherwise specified; and
- the policies set out apply to all payers, whether remitting on a quarterly, monthly or bimonthly basis or deducting on a regular or irregular basis.

Date of effect

4. This Ruling applies to all decisions involving the exercise of the discretion to remit undeducted tax penalty decisions made on or after the date of final release of this Ruling. However, the Ruling does not apply to taxpayers to the extent that it conflicts with the terms of a settlement of a dispute agreed to before the date of issue of the Ruling (see paragraphs 21 and 22 of Taxation Ruling TR 92/20).

Ruling and explanations

5. A payer may fail to deduct tax or deduct insufficient tax (under-deduct) from a payment, either inadvertently or by design. This may occur, for example, when the payer is unaware of the status of a worker for PAYE purposes, or incorrectly treats a salary or wage payment as a prescribed payment.

6. A tax deduction is held to have been made from a payment to a worker where the records of a payer indicate this to be the case, irrespective of whether a provision for the required amount has been made. Failure to pay this deduction to the Australian Taxation Office (ATO) is a '**failure to pay**' offence. ATO policy on offences of this type will be discussed in a separate draft Ruling which will issue in 1997.

7. Failure to either deduct or pay deductions may result in prosecution (see the Commissioner's prosecution guidelines set out in Taxation Ruling IT 2246) and consequent court imposed penalties. Alternatively, the law provides for penalty which may be imposed directly by the Commissioner. Penalties imposed by the Commissioner are often referred to as 'administrative' penalties.

8. The provisions dealing with penalties recognise there will be circumstances where it is fair for the penalty to be remitted from the amount specified in the provision imposing it. As a result, the Commissioner may remit the whole or part of any penalty imposed.

9. The Commissioner encourages payers to seek guidance, either from the ATO or from qualified taxation practitioners, in determining the appropriate treatment of payments. Payers who exercise care, but make an 'honest mistake' in fulfilling their obligations may expect to be treated leniently. Conversely, payers who fail to exercise the degree of care expected will receive significantly higher penalties. Those payers who intentionally disregard their obligations under the law will be dealt with to the extent that the law provides.

Changes to previous guidelines

10. This Ruling brings about a number of changes to the guidelines that formerly operated under Taxation Rulings IT 2172, IT 2210 and IT 2211. Those Rulings will be withdrawn from the date of final release of this Ruling.

11. The main features are:

- **voluntary disclosures** are rewarded through reduced rates of penalty;
- to increase consistency, specific rates are set for typical categories of behaviour, which may be varied to allow for mitigating or aggravating factors;
- the scale of typical penalties is broadened to deal with a range of behaviours varying from honest mistakes to **intentional disregard** of the law;
- a **repeat offence** attracts an automatic increase in the **culpability penalty**;
- payers are held accountable for the acts of **authorised representatives**; and
- the **period of examination** has been varied to allow ATO officers discretion to examine records for an extended period where a breach has been detected.

Discretion of ATO officers

12. The legislation requires that the discretion to remit penalties must be exercised in the light of the facts of each particular case. At all times, these guidelines should be administered in a commonsense manner and officers exercising a discretion should detail what factors they have taken into account in their deliberations.

13. A determination of the appropriate rate of penalty depends on the circumstances surrounding each breach. Officers should weigh up all factors and determine the most appropriate rate under the particular circumstances. Officers should ensure they record:

- the relevant findings of fact;
- the evidence on which these findings are based; and
- the reasons for the decision.

14. In examining cases where a breach may have occurred, officers should be flexible in determining the appropriate period of examination. The period of examination should be that period of time

which the officer believes represents the best balance between the need to ensure the level of penalty imposed is adequate to deter further breaches, and the need to be conscious of the cost, both to the ATO and the payer, of these examinations. Examinations should be extended only where it is reasonable to do so having regard to such factors as whether substantial undeducted or under-deducted amounts have been detected.

Failure to deduct by non-government bodies

Penalty provisions

15. A payer is liable to a penalty if the payer makes a reportable payment, pays salary or wages, or makes a prescribed payment without first making deduction as required under sections 220AF (RPS), 221C (PAYE), 221YHD or 221YHDA (PPS). These penalties automatically apply according to sections 220AS (RPS), 221EAA (PAYE) or 221YHH (PPS).

Effect of penalty provisions

16. There are two components of the penalty referred to above. The first component is a flat amount equal to the amount of tax the payer failed to deduct. This is defined in the income tax law (see paragraph 15) as 'undeducted amount' penalty, but in this Ruling is referred to as culpability penalty. The second component is an amount equal to 16% per annum of the culpability penalty amount, calculated from the date when the deduction should have been paid, had it been made as required, until the date of payment. This is referred to as **late payment penalty**, and continues to accrue until the culpability penalty is paid.

Calculation of the penalty amount

17. The penalty amount is the sum of the culpability penalty amount plus the late payment penalty. The formula for calculating this can be expressed as follows:

Total penalty = C + [(C x 16%) x (N / Y)]

where:

C is the 'culpability penalty amount' for any particular month;

N is the number of days late measured from the time that the deduction, had it been made, should have been paid to the date of payment of the penalty; and

Y is the number of days in the financial year.

See **Examples** (below) for calculations.

Remission of culpability penalty

18. Culpability penalty penalises payers for failure to comply with the law. It reflects the level of accountability to be assigned to the payer for non-compliance.

19. The Act applies a culpability penalty equal to 100% of the amount not deducted. However, the Commissioner is able to remit the whole or any part of this penalty under subsections 220AU(2) (RPS), 221N(2) (PAYE) or 221YHL(2) (PPS). Paragraphs 23 to 31 set out the reduced culpability penalties that may be expected in typical cases as well as explain factors warranting a departure from that standard (whether further decreasing or increasing penalty). The culpability penalty will consist of the sum of the typical culpability rate, decreased or increased by a factor for mitigating or aggravating circumstances, and a factor for repeat offences.

Voluntary disclosure

20. Persons who voluntarily disclose their non-compliance could generally expect to receive concessional treatment when considering the level of culpability penalty. The concession given is that the statutory culpability penalty (100% of the amount not deducted) will be reduced by 80% to a figure of 20% of the amount not deducted. To qualify for this concessional treatment, a voluntary disclosure must:

- be in writing;
- contain all relevant material facts; and
- not be made as a result of any ATO activity relating to the taxpayer's RPS, PAYE or PPS liability.

21. If the disclosure is incomplete, but in the Commissioner's opinion the degree of incompleteness has little material effect on the outcome, it may still qualify as voluntary.

22. If a payer discloses one part of a shortfall in the amount deducted because he or she is only aware of that part of the shortfall and that disclosure is full and true, the payer is entitled to benefit from reduced penalty on that part of the shortfall. The remainder of the shortfall will not be treated as a voluntary disclosure.

Culpability penalty

23. Decisions to reduce culpability penalty will take into account the following factors:

- the typical culpability rate based on the accountability of the payer;
- the presence of mitigating or aggravating factors; and/or
- whether the offence is a repeat offence.

Typical culpability rates

24. Persons who fail to deduct would ordinarily have their culpability penalty reduced, depending on their level of accountability. Typically, penalties may be reduced from the 100% of the amount not deducted that is imposed by law to the percentages in the table below:

Reasonable care	0%
Lack of reasonable care	15%
Recklessness	30%
Intentional disregard	60%.

Where a voluntary disclosure has been made, this typical culpability rate is applied to the concessional amount of culpability penalty calculated in accordance with paragraph 20 above (i.e., the rate is applied to an amount being 20% of the amount not deducted).

25. It should be noted that:

- in the event of multiple breaches, each breach is considered separately;
- the culpability component is applicable even if the culpable behaviours are the actions of an authorised representative of the payer; and
- the typical rates set out above may be further decreased or increased should there be other mitigating or aggravating circumstances present.

Mitigating or aggravating circumstances

26. The Commissioner expects that ATO officers will receive **reasonable co-operation** in the performance of their duties. Co-operation above or below this level during examinations may result in variation of the typical culpability rate. The examples outlined below illustrate the levels by which the typical culpability rate may be varied.

27. Mitigating circumstances will reduce the typical rate by a factor of up to 20%, and may include the following:

- greater than reasonable co-operation during the examination 10%
- **positive co-operation** 20%.

28. Aggravating circumstances may increase the typical culpability rate by a factor of up to 20%, and may include the following:

- lack of reasonable co-operation causing delay of the examination 10%
- deliberate false or misleading statement 20%.

29. Only one of the above rates may apply. If a payer exhibits more than one of these behaviours then the behaviour which provides the maximum increase or decrease in the typical culpability rate will be applied.

Repeat offence

30. A person who has been penalised for a failure to deduct offence within 36 months prior to the penalty decision relating to the offence under consideration may be liable to an increase in penalty.

31. The penalty for a repeat offence will be an additional 33.3% increase in the culpability rate.

Remission of late payment penalty

32. Late payment penalty is a penalty imposed by the Commissioner to compensate the Commonwealth for the non-availability of monies resulting from a payer's failure to deduct the appropriate rate of tax.

33. Remission of late payment penalty is available under subsections 220AU(3) (RPS), 221N(1) (PAYE) or 221YHL(1) (PPS) where the Commissioner forms the view that one of three tests is satisfied:

- the failure to deduct WAS NOT CAUSED directly or indirectly by an act or omission of the payer, and s/he has taken reasonable action to correct the cause;

OR

- the failure to deduct WAS CAUSED directly or indirectly by an act or omission of the payer, but s/he has taken reasonable action to correct the cause AND in the circumstances it is reasonable to remit all or part of the penalty;

OR

- other special circumstances apply.

34. The first two tests for remission indicate that it is necessary for the payer to have taken reasonable steps to correct the circumstances that lead to the failure to deduct tax and, therefore, it is unlikely that failure to deduct will re-occur in the future. Where the payer has not taken such steps, then there is no basis for remission of the late payment penalty unless there are special circumstances. Factors which may assist officers in determining remissions under the first two tests are:

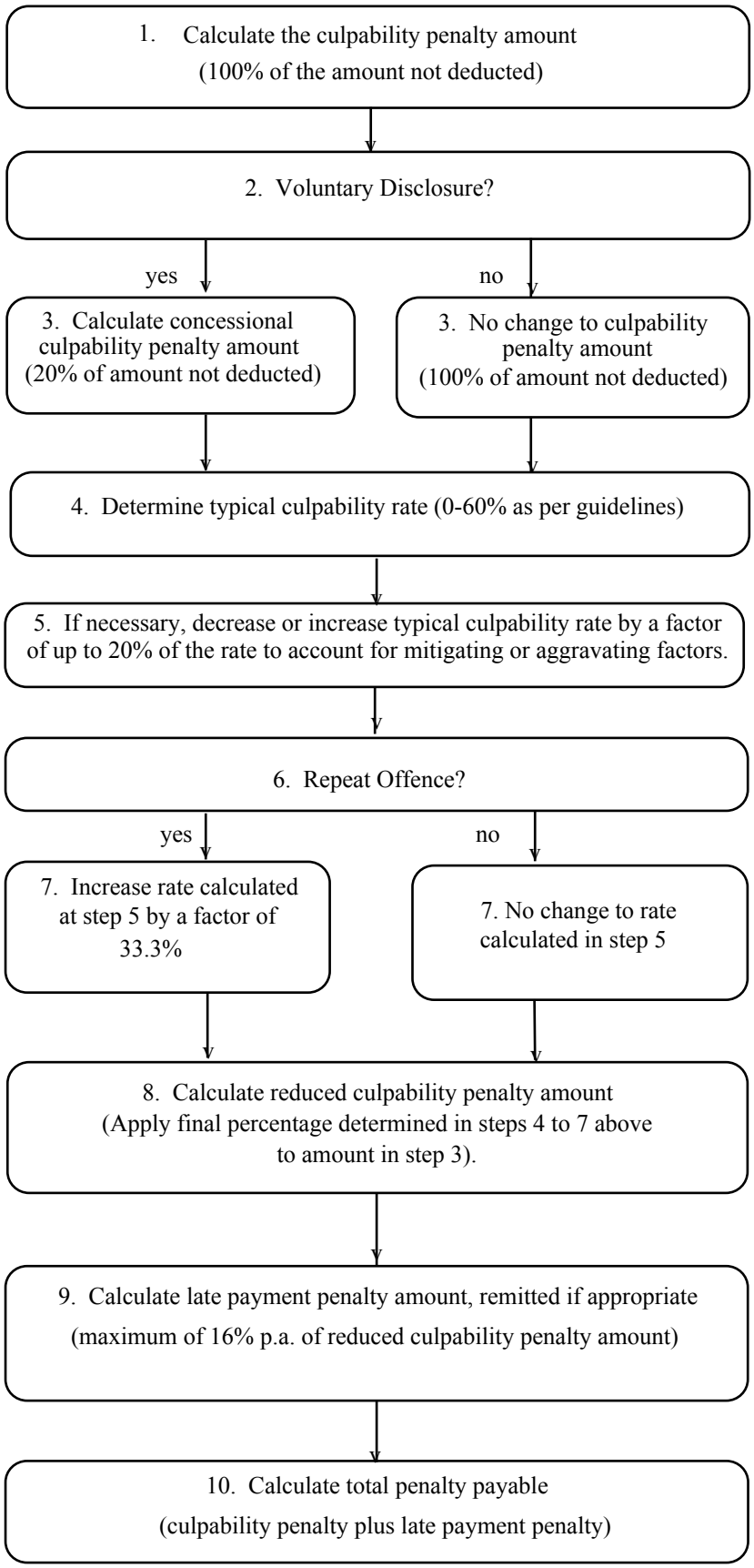
- the period over which the failures to deduct continued;
- ensuring that the circumstances that contributed to the failure to deduct are unlikely to recur;
- the speed with which the payer identified the breach(es); and
- the efforts made by the payer to avoid a recurrence.

35. Where a 'special circumstances' remission is sought, officers may consider circumstances such as flood, fire or other natural disaster or serious ill health. Care must be taken by officers to ensure the circumstances relied on prevented the payer from making deductions. In other words, the circumstance (e.g., a fire that destroys the payer's business records necessitating some reconstruction of records to determine the exact amount required to be deducted) should not be viewed in isolation, but in the light of its effect on the payer's capacity to make the deduction.

36. Unless the officer is satisfied that these conditions apply then the late payment element of the **statutory penalty** will continue to be imposed at the rate of 16% per annum.

Decision chart

37. The following chart illustrates the decision making process that an ATO officer will follow to determine culpability penalty.


1. Calculate the culpability penalty amount
(100% of the amount not deducted)
2. Voluntary Disclosure?
yes
no
3. Calculate concessional culpability penalty amount (20% of amount not deducted)
3. No change to culpability penalty amount (100% of amount not deducted)
4. Determine typical culpability rate (0-60% as per guidelines)
5. If necessary, decrease or increase typical culpability rate by a factor of up to 20% of the rate to account for mitigating or aggravating factors.
6. Repeat Offence?
yes
no
7. Increase rate calculated at step 5 by a factor of 33.3%
7. No change to rate calculated in step 5
8. Calculate reduced culpability penalty amount
(Apply final percentage determined in steps 4 to 7 above to amount in step 3).
9. Calculate late payment penalty amount, remitted if appropriate
(maximum of 16% p.a. of reduced culpability penalty amount)
10. Calculate total penalty payable
(culpability penalty plus late payment penalty)

Failure to deduct by government bodies

Penalty provisions

38. The obligations of a **government body** to deduct tax are the same as those of a non-government body (refer paragraph 15), but the penalty provisions vary, as set out below. Factors influencing remission of penalty where government bodies are concerned will not differ in principle from cases involving other payers.

Effect of penalty provisions

39. No provision exists to allow culpability penalties to be imposed on a government body for failure to deduct tax. Similarly, no provision exists to allow late payment penalties to be imposed on the Commonwealth. However, there is scope to apply 'late payment' type penalties to State or Territory governments or authorities of the Commonwealth, a State or a Territory.

40. In the case of PPS, the penalty provided by subsection 221YHH(2) is equal to 16% per annum of the amount the payer failed to deduct, and is calculated in respect of the period commencing on the day on which the payer should have paid the amount of the deduction had it been made as required to the Commissioner and ending on the day the penalty payment is made.

41. Similar penalties are provided for RPS and for PAYE purposes by subsection 220AS(3) (RPS) or 221EAA(2) (PAYE). The penalty is equal to 16% per annum of the amount the payer failed to deduct, calculated in respect of the period commencing on the day on which the employer should have made the deduction, and ending on 30 June in the financial year in which that day occurred.

42. These penalties automatically come into effect as soon as there has been a failure or refusal to deduct the relevant amount.

Remission of penalty amount

43. Where sufficient circumstances exist, the Commissioner is able to remit the whole or any part of the penalty under subsections 220AU(2) (RPS), 221N(2) (PAYE) or 221YHL(2) (PPS). The penalty provisions for RPS and PAYE are not consistent with those for PPS. Consequently, in all cases the Commissioner will exercise his discretion to:

- remit any penalty payable for the period from the date the deduction should have been made to the date the deduction

(had it been made) should have been paid to the Commissioner;

AND

- remit any penalty payable for the period after the date of payment where the payment is made in the financial year in which the failure to deduct occurred;

OR

remit any penalty payable after 30 June following the date when the failure to deduct occurred;

whichever first occurs.

44. Because the penalty applicable to government bodies is similar in nature to a late payment penalty, remissions should be determined using the guidelines for 'remission of late payment penalty for non-government bodies' (refer paragraphs 32 to 36).

Calculation of penalty amount

45. This penalty can be expressed as 16% per annum of the amount the payer failed to deduct, calculated on a daily basis. The formula for calculating the penalty can be expressed as follows:

Penalty = [(U x 16%) x (N / Y)]

where:

U is the 'undeducted amount' for any particular month;

N is number of days late measured from the time that the amount, had it been deducted, became due and payable to the date of payment for PPS or 30 June of the financial year in which the non-deduction occurred for RPS or PAYE; and

Y is the number of days in the financial year.

See **Examples** (below) for calculations.

Financial hardship

46. These remission guidelines have generally been concerned with examining those reasons or factors that have contributed to the payer being liable for penalty. Officers should also consider any financial hardship imposed on a payer by the level of penalty. Where the level of penalty determined according to these guidelines would cause genuine financial hardship for the payer a further remission may be warranted. Generally, the Commissioner will only consider a further

remission of the amount of the culpability penalty. The extent of any remission will depend on the facts in each case.

47. Financial hardship may be demonstrated by:

- the INABILITY to borrow funds to pay outstanding penalties;
- the commencement of liquidation proceedings;
- the effect the penalty will have on the capacity of the business to continue to trade; or
- the necessity to sell a major personal asset (such as the family home or car) in order to pay the penalty amount.

The Commissioner considers that a payer who is unable to pay penalties due to cash flow problems is not suffering financial hardship.

Review of decisions relating to penalty

48. Under subsections 220AU(4) (RPS), 221N(3) (PAYE) or 221YHZE(3) (PPS) the Commissioner is required to give written notice of his decision not to remit, or remit only part of, the penalty. Persons have a right to object against the Commissioner's remission decision on culpability penalty, or on late payment penalty for RPS purposes. These rights arise under subsection 221N(4) (PAYE) or sections 220AZH (RPS) or 221YHT (PPS).

49. There is no provision for objection against PAYE or PPS late payment penalties or against any penalties imposed on government bodies. In these cases, a payer may request a review by writing to the ATO, setting out the circumstances that led to the late payment of the tax and the basis on which remission is sought.

Objections and appeals

50. Where an objection is lodged it must be submitted in writing, within 60 days after notification of the original decision.

51. Where an objection is disallowed in whole or in part, the payer may apply to the Administrative Appeals Tribunal (AAT) for a review of the decision, or appeal to the Federal Court against the decision. The application for review or appeal must be lodged in the AAT or the Federal Court as appropriate.

52. The requirements of the objection and appeal provisions are set out more fully in Part IVC of the TAA.

53. A decision not to remit penalty may also be reviewed by the Federal Court under the *Administrative Decisions (Judicial Review) Act 1977*.

Examples

54. The following are intended as a guide only.

55. The examples are of offences involving non-government bodies under the PAYE provisions. However, the principles used to determine the level of culpability can be equally applied to RPS and PPS cases.

56. As detailed in paragraph 39, the law does not provide for a culpability penalty for government bodies, although they may be subject to late payment type penalty.

Example 1 - reasonable care

Facts

57. During the examination an ATO officer discovered the employer had been using superseded tax scales. As a result, the employer has under-deducted small amounts from some payments over a period of several months. The employer regularly consults with its accountant when it completes its annual group tax reconciliation and when advised of the error the employer corrected it.

Decision

58. The employer has acted with reasonable care in complying with its obligations. The employer has a history of deducting at the prescribed rate and is now deducting correctly. The employer has not hindered the ATO officer in the completion of her duties and the under-deduction was the result of an isolated 'honest mistake' by the employer.

59. Factors considered when determining the penalty are:

- deductions were made in accordance with what the employer honestly believed were the correct rates;
- the mistake resulted in a small amount of tax not being deducted;
- the employer corrected the error as soon as it was identified; and

- in the main the employer has deducted at the prescribed rate and will do so in the future.

Penalty calculation

60. Culpability penalty is calculated as:

Typical culpability rate (reasonable care)	= 0%
Penalty payable	= NIL

Example 2 - lack of reasonable care (with voluntary disclosure)

Facts

61. The employer has failed to deduct tax instalments of $10,000 from payments to contract workers engaged on a casual basis. The nature of the work performed was different from the work undertaken by permanent employees of the company. No enquiries were made of her accountant or the ATO to ascertain the correct treatment of the payments. After several months, but prior to the notification of the examination, the employer disclosed to the ATO that she was unsure of the status of the casual workers.

Decision

62. In this case it has been determined that the employer has acted with 'lack of reasonable care' in complying with her obligations. Although in doubt about the status of these workers the employer made no attempt to contact her accountant or the taxation office to determine the correct treatment of payments. 'Reasonable care' requires the employer to make reasonable enquiries to determine the correct treatment of payments.

63. By disclosing the error prior to the commencement of any examination the employer made a voluntary disclosure and is entitled to concessional treatment.

64. Factors considered when determining the typical culpability rate are:

- the payment was made to a class of worker not normally engaged by the employer;
- at the times of payment the employer was unsure of the status of the workers; and
- the employer did not attempt to establish the correct treatment of the payment.

65. The concessional factor is that the employer made a voluntary disclosure prior to any examination.

Penalty calculation

66. Statutory penalty amount (100% of amount not deducted) = $10,000

Concessional penalty amount (20% of amount not deducted) = $2,000

Culpability penalty is calculated as:

Typical culpability rate (lack of reasonable care) = 15%

Culpability penalty amount = $2,000 x 15%

= $300

Late payment penalty (LPP) will continue to be calculated at 16% since no grounds arose for the remission of this component of the penalty.

Late payment component is calculated using the formula:

LPP = [(C x 16%) x (N / Y)]

where:

C is the culpability penalty amount for the month;

N is the number of days late, computed from the expiration of the period within which the amount that the employer failed to deduct would have been required to be paid to the Commissioner until the date of payment (in this example 200 days); and

Y is the number of days in the financial year.

Therefore:

LPP = [($300 x 16%) x (200/365)]

= $26.30

Penalty payable = Culpability penalty + LPP

= $300 + $26.30

= $326.30.

Example 3 - recklessness (with aggravating factor)

Facts

67. Employer has failed to deduct tax instalments of $10,000 from site allowance payments. The employer delayed the examination by

stating the records were with the accountant and later admitted the records were always in his possession. The employer also stated during the examination he understood many of the allowances paid in his industry are subject to tax instalment deductions but to create the impression he was paying over the award he decided not to tax any allowances.

Decision

68. In this case the employer has been reckless in complying with his obligations because, although not sure of his liability, he was aware that most industry allowances are subject to tax instalment deductions. No attempt was made to contact his accountant or the ATO to ensure the correct treatment of these payments. The employer has also hindered the officer in the completion of his duties by providing misleading information about the location of his records.

69. Factors considered when determining the typical culpability rate are:

- the payment was made to a class of worker normally engaged by the employer;
- at the time of payment the employer was unsure of and did not attempt to establish the correct treatment of the payment; and
- the employer was aware that most allowances are subject to tax instalment deductions.

70. The aggravating factor is the deliberate false or misleading statement made.

Penalty calculation

71. Statutory penalty amount (100% of amount not deducted) = $10,000.

Culpability penalty is calculated as:

typical culpability rate (recklessness)	=	30%
aggravating factor (deliberate false or misleading statement) [20% of 30%]	=	6%
culpability penalty rate [30% + 6%]	=	36%

culpability penalty amount = $10,000 x 36%

= $3,600.

Late payment penalty (LPP) will continue to be calculated at 16% since no grounds arise for the remission of this component of the penalty.

Late payment component is calculated using the formula:

LPP = [(C x 16%) x (N / Y)]

where:

C is the culpability penalty amount for the month (in this example $3600);

N is the number of days late, computed from the expiration of the period within which the amount that the employer failed to deduct would have been required to be paid to the Commissioner to the date of payment (in this example 200 days); and

Y is the number of days in the financial year.

Therefore:

LPP = [($3,600 x 16%) x (200/365)]

= $315.60.

Total penalty payable = culpability penalty amount + LPP

= $3,600 + $315.60

= $3,915.60.

Example 4 - intentional disregard (with aggravating factors and repeat offence)

Facts

72. The employer has failed to deduct tax instalments of $10,000 from payments made to employees. The employer advised the ATO officer during the examination that he did not have any employees. The employees and the employer had agreed there would be no deductions made and payments were disguised to make detection of the arrangement difficult. The employer was previously penalised following an examination conducted 15 months ago for failing to deduct from payments to his workers.

Decision

73. In this case the employer was advised of his obligations and has intentionally disregarded the advice of the Commissioner. The employer made false statements to the ATO officer and disguised the nature of the payments.

74. Factors considered in determining the typical culpability rate are:

- the payment was made to a class of worker normally engaged;
- at the time of payment the employer was aware of the proper treatment of the payment; and
- employer was advised previously of the obligation to deduct.

75. Aggravating factors are:

- the employer concealed the nature of the payments; and
- the employer made a false statement to the ATO officer.

76. Repeat offence factors are:

- the previous examination was conducted within 36 months; and
- the employer was penalised for the breach detected at that examination.

Penalty calculation

77. Statutory penalty amount (100% of amount not deducted) = $10,000.

Culpability penalty is calculated as:

typical culpability rate (intentional disregard)	=	60%
aggravating factors (concealment, false statement) (20% of 60%)	=	12%
repeat offences component (33.3% of (60 + 12%))	=	24%
culpability penalty rate (60% + 12% + 24%)	=	96%

culpability penalty amount = $10,000 x 96%
= $9,600.

Late payment penalty (LPP) will continue to be calculated at 16% since no grounds arise for the remission of this component of the penalty.

Late payment component is calculated using the formula:

LPP = [(C x 16%) x (N / Y)]

where:

C is the culpability penalty amount for the month

N is the number of days late, computed from the expiration of the period within which the amount that the employer failed to deduct would have been required to be paid to the Commissioner to the date of payment. In this example 200 days

Y is the number of days in the financial year.

Therefore:

LPP = [(9,600 x 16%) x (200/365)]

= $841.60

Total penalty payable = culpability penalty amount + LPP

= $9,600 + $841.60

= $10,441.60.

Glossary

78. Terms used in this Ruling are intended to have the same meaning as they have in other areas of tax law. The meanings of commonly used terms are summarised as follows:

Authorised representative

79. An authorised representative is any representative appointed or having the implied authority of the payer for RPS, PAYE or PPS purposes and may include an accountant, tax agent, director or employee.

Culpability penalty

80. Culpability penalty is the level of penalty imposed for a breach of the law that best reflects the accountability of the payer. The culpability penalty is the sum of the typical culpability rate component, the mitigating or aggravating factors component and the repeat offence component.

Government body

81. Government body means the Commonwealth, a State, a Territory or an authority of the Commonwealth or a State or a Territory but does not include corporations wholly owned by government or other autonomous organisations funded by government.

Intentional disregard

82. Intentional disregard occurs when a payer decides to ignore known correct treatment of a particular payment or chooses to ignore advice received from the Commissioner or other relevant authority.

For a payer to intentionally disregard obligations under income tax law the payer must know what those obligations are and choose to disregard them. Where a payer has genuine doubt regarding an obligation to deduct tax , and the payer chooses not to deduct, this would not amount to intentional disregard.

Lack of reasonable care

83. Lack of reasonable care occurs when a payer does not take the care that a reasonable, ordinary person would have taken in the same circumstances.

Late payment penalty

84. The amount calculated to compensate the Commonwealth for the non availability of monies properly payable to it.

Payee(s)

85. Payee refers to any person entitled to receive a payment affected by RPS, PAYE or PPS legislation.

Payer(s)

86. Payer refers to an employer under the PAYE system as well as to a payer under the PPS or the RPS system and includes an individual, a company, a partnership, a government body or a trust.

Period of examination

87. Period of examination means the period of time during which an ATO officer will examine the books of a payer to establish whether there has been compliance with the laws relating to the deduction and payment of RPS, PAYE and PPS.

Positive co-operation

88. Positive co-operation occurs when a payer voluntarily and fully discloses non-compliance after being informed by the Commissioner that an examination has or will commence.

Reasonable care

89. Reasonable care requires that a payer exercises the care that a reasonable, ordinary payer would exercise to fulfil that payer's tax obligations. Minor carelessness in respect of an amount that the Commissioner considers not to be significant in percentage and dollar terms would also be regarded as reasonable care.

Reasonable co-operation

90. In general terms, reasonable co-operation requires that a payer provides relevant and reasonable information, whether orally or in writing, truthfully and to the best of his or her ability; and the timely provision of books and records having regard to the particular payer's circumstances. A payer will be allowed sufficient time in which to seek professional advice in relation to the issues being examined. Reasonable co-operation does not require that a payer agree with a tax officer's views. What it requires is the timely provision of information; not necessarily acceptance of a particular interpretation of that information.

91. Factors indicating less than reasonable co-operation would include:

- failure to provide records within a reasonable period of time; or
- failure to adhere to appointments with ATO officers without due excuse.

92. Factors indicating greater than reasonable co-operation would include:

- the payer assists in extracting information from the accounts during the examination;
- the payer provides staff to assist in extracting information during the examination; or
- the payer volunteers general areas where non-compliance may have occurred without fully disclosing the detail of the non-compliance.

Recklessness

93. Recklessness may occur when a payer does not take reasonable steps to clarify the correct treatment of a payment. Dishonesty may not be involved.

Repeat offence

94. A repeat offence occurs where a payer has been penalised for a failure to deduct or for under-deducting from a payment within 36 months of the offence under review. To determine if the offence detected is a repeat offence each separate examination will be treated as involving a single offence.

Statutory penalty

95. The statutory penalty is the rate of penalty applied by the law prior to any remissions granted by the Commissioner.

Under-deduct

96. A payer may under-deduct when the payer deducts a tax instalment at less than the rate required by the Act. This may occur, for example, when a payer deducts a tax instalment based on an expired variation certificate.

Voluntary disclosure

97. A disclosure will generally be treated as having been made voluntarily if it is made by that payer prior to a taxation officer having knowledge that a breach has been committed.

Your comments

98. If you wish to comment on this Draft Ruling, please send your comments by: 14 February 1997

to:

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