


IT 2171 - Tax instalment deductions (paye) - remission of penalties - failure to pay as required - arrangements to pay after the due date

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TAXATION RULING NO. IT 2171

TAX INSTALMENT DEDUCTIONS (PAYE) - REMISSION OF
PENALTIES - FAILURE TO PAY AS REQUIRED - ARRANGEMENTS
TO PAY AFTER THE DUE DATE

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REFERENCE NO:	SUBJECT REFS:	LEGISLAT. REFS:
I 1187270	ADDITIONAL (PENALTY) AMOUNTS : IMPOSITION AND REMISSION	221F(12) 221G(4A) 221N
	ARRANGEMENTS TO PAY AFTER THE DUE DATE	221F(7)

PREAMBLE

Where an employer pays salary or wages to an employee, the employer is required to deduct tax instalments at the rate prescribed in the income tax regulations. Under the provisions of the law, an employer who fails to pay amounts deducted from salary or wages by the 7th day of the month next succeeding the month in which the deductions were made or as otherwise required by the law is liable to a statutory penalty or prosecution. It should be noted that the previous practice of not imposing penalty for a late group remittance unless a final notice had issued has been discontinued.

2. This ruling provides guidelines for the exercise of the Commissioner's discretion under :

- (i) section 221N to remit the statutory penalties imposed by sub-sections 221F(12) and 221G(4A); and
- (ii) sub-section 221F(7) to vary the requirement that tax instalment deductions be paid not later than the seventh day of the month.

3. In providing these guidelines there is no intention of laying down any conditions which may restrict a Deputy Commissioner in exercising his discretion. The guidelines provided in this ruling supersede all previous guidelines issued. To the extent that earlier rulings or guidelines are intended to be retained, they have been incorporated in this ruling.

4. In framing a policy which covers variation of the requirement to pay tax instalments no later than the 7th day of each month and the remission of additional amounts, regard must be given to the overall collection and recovery philosophy of

the Commissioner and in particular to the special nature of tax instalment deductions.

5. The guidelines in this ruling have been dealt with under the following headings:

- (i) calculation of penalty;
- (ii) level of penalty to be imposed in the first instance, i.e., is any penalty to be remitted automatically when calculating penalty to be imposed at the time payment is made;
- (iii) circumstances warranting remission of penalty; and
- (iv) circumstances for granting further time to pay.

6. These guidelines discuss sanctions as they apply to group employers. The principles put forward, however, apply with equal force to employers other than group employers (as discussed in paragraph 7 below). Accordingly, the following guidelines should be interpreted to apply to these employers as appropriate and references to section 221F should be read as referring to section 221G.

7. Where an employer other than a government body refuses or fails to comply with the requirement in paragraph 1 above, sub-paragraph 221F(12) (b) (ii) of the Act imposes a statutory penalty equal to a flat penalty of 20% of the unpaid amount that has been deducted plus a late payment penalty of 20% per annum of the unpaid amount and the 20% flat penalty that remains unpaid after the due date. Sub-section 221N(1) provides for remission of the late payment penalty component in terms similar to sub-section 207(1A), whereas sub-section 221N(2) provides for remission of the flat penalty component for reasons that the Commissioner considers sufficient.

8. Sub-section 221G(4A) provides that an employer, other than a group employer or the Commonwealth, who makes a deduction from salary or wages and refuses or fails to affix tax stamps of a face value equal to the amount of the deduction (the 'principal amount') as required, is liable to a statutory penalty. Where the employer is other than a government body, the statutory penalty is equal to a flat penalty of 20% of the principal amount plus a late payment penalty of 20% per annum of the principal amount and the flat penalty amount that remains unpaid after the due date for payment.

9. Where an employer, being a government body other than the Commonwealth, refuses or fails to pay tax instalment deductions or affix tax stamps as required, the employer is liable to a statutory penalty pursuant to sub-paragraph 221F(12) (b) (i) or paragraph 221G(4A) (c) respectively.

10. The statutory penalty in respect of each offence referred to in paragraph 9 above is an amount equal to 20% per annum on so much of the principal amount as remains unpaid,

computed from the time when it was required to be paid.

11. In the absence of circumstances described in paragraphs 26-34 of this ruling, the full amount of the penalty as provided by the legislation should be allowed to stand for government body employers. Of course, where the circumstances described exist, the same considerations should be given to a government body employer as would apply to a non-government body employer. Any request for remission of penalty must be considered under the terms of the legislation remission guidelines provided in sub-section 221N(1).

RULING

Calculation of Penalty

12. It is appropriate to clarify at the outset the method of calculating this penalty in view of its difference from other penalties imposed by the Income Tax Assessment Act.

13. There are three base amounts to be taken account of in calculating the penalty, viz.,

- X - the "principal amount" for any particular month;
- Y - the "principal amount" for any particular month less any payments made; and
- Z - the flat penalty component (i.e. 20% of the principal amount subject to any remissions granted) less any payments made.

Note - The "principal amount" is the amount payable to the Commissioner by an employer (as required by paragraph 221F(5)(a) or paragraph 221G(1)(b) as appropriate) which remains unpaid after the time by which it is required to be paid.

14. Using these codes, the formula for calculating the total penalty can be expressed as follows:

$$\text{Penalty} = \frac{20}{100} \times X + \left[\frac{20}{100} \times \frac{n}{365} (Y + Z) \right]$$

where : n = number of days late measured from the time that the unpaid amount (X) became due and payable to the date of payment (less 7 days grace).

15. The amount of the late payment component cannot be calculated until the amount of flat component to be imposed has been settled, i.e., a decision has been made on whether remission of any part of the flat penalty is to be granted.

16. It should be noted that the 20% per annum component of

the penalty continues to accrue until both the unpaid amount (i.e., the principal amount) and the flat penalty component are both paid in full. That is, the 20% per annum component continues to accrue between the date of issue of a notice seeking payment of penalty imposed and the date of payment of that penalty.

17. The same rules that apply for the imposition of additional tax generally, also apply to the penalties imposed under the PAYE legislation, i.e.:

- (a) accrued penalty will not be imposed unless it exceeds \$10;
- (b) where the amount of accrued penalty is less than \$100 but greater than \$10 a demand for payment is to issue. If the amount remains unpaid it is to be allowed to remain on account for twelve months. If during that period it grows to exceed \$100 it is to be referred to Recovery. If after twelve months the amount remains less than \$100 it is to be written off as "uneconomic to pursue"; and
- (c) where the amount is \$100 or more, collection proceedings are to be instituted.

Level of Penalty

18. The provisions of section 221F come into effect automatically as soon as the conditions for its application exist. That is, as soon as the amount becomes overdue, the employer is liable to both the flat penalty and the late payment penalty.

19. The penalty for failure to pay comprises a flat penalty in respect of the offence itself, and a per annum penalty to compensate for any loss of revenue caused by the delayed collection of money from the time it was required to be paid. It is crucial that both these elements of the penalty be included if we are to succeed in ensuring continuing compliance with the PAYE system.

20. In this regard, the offence itself must be regarded as of such seriousness as to warrant penalty. Deductions from salary or wages are not taxation debts in the conventional sense but rather moneys which belong to employees and which are in transit to the Taxation Office. In essence, the deductions must be regarded as being in the nature of trust moneys held on behalf of employees. They are not the employer's assets available for business or private purposes, nor are they comparable to the employer's own taxation liabilities.

21. It is again stressed that any unauthorised use of these moneys should be penalised in a way that compensates the Government for not having the use of that money. The Government is not, and should not be seen to be, a source, albeit indirectly, of funds for business or other related purposes, and

accordingly employers should bear a cost of using these funds at least comparable with what he or she might be expected to pay if the funds were secured through normal means.

22. While the arguments for allowing penalty to stand in full (i.e., 20% flat of the unpaid amount) in the first instance are sufficiently valid to allow us to do so, it is considered that the excessive penalties which can ensue by imposition of the full flat penalty component necessitate that action be taken to remit, in part, the flat penalty component.

23. Accordingly, penalties for failure to pay tax instalment deductions as required, are to be imposed as follows:

- flat penalty to be remitted down to a level equivalent to 20% of the penalty provided for under the Act, i.e., in effect a penalty of 4% flat of the unpaid amount is to be imposed;

and

- late payment penalty to be allowed to stand in full.

24. It should be noted that ultimately it is intended to adopt a penalty system whereby second and subsequent offences will attract progressively higher levels of the flat penalty. It is envisaged that this system will be based on a scale of penalties designed to encourage an optimum degree of voluntary compliance while allowing sufficient "penal" flexibility to take habitual offenders to task. A separate Taxation Ruling will issue on this aspect when final policy has been formulated. For the time being, however, system constraints necessitate the adoption of the above system of penalties.

25. Further remission of either the flat component or the late payment penalty component would be dependent upon the circumstances surrounding the late payment which the employer is able to put forward in explanation of the delay (see paragraphs 26-34).

Remission of Penalty

26. Remission of the late payment penalty component is available where the Commissioner is satisfied that :

- (a) (i) the circumstances that contributed to the delay in payment of the principal amount were not due to, or caused directly or indirectly by, an act or omission of the employer; and
- (ii) the person has taken reasonable action to mitigate, or mitigate the effects of, those circumstances;
- (b) (i) the circumstances that contributed to the

delay in payment of the principal amount were due to, or caused directly or indirectly by, an act or omission of the employer;

(ii) the person has taken reasonable action to mitigate, or mitigate the effects of, those circumstances; and

(iii) having regard to the nature of those circumstances, it would be fair and reasonable to remit the late payment penalty or part of the late payment penalty; or

(c) there are special circumstances by reason of which it would be fair and reasonable to remit the late payment penalty or part of the late payment penalty.

27. Remission of the flat penalty component is available in less restricted circumstances, i.e., where the Commissioner thinks there are sufficient reasons to do so.

28. As a first observation, it has already been suggested that the formula for calculation of the penalty envisages consideration of remission of the flat penalty component as an interim step before the late payment penalty, and therefore the total amount of penalty, can be determined. However, the circumstances which warrant further remission of either the flat penalty or the late payment penalty are considered to be the same. Accordingly, further remission of the flat penalty or the late payment penalty should be considered as one and, in this respect, the provisions of the legislation dealing with remission of the late payment penalty component (i.e., sub-section 221N(1)) appear to provide useful guidelines.

29. In considering the question of remitting penalty under the circumstances described in sub-section 221N(1) it must be borne in mind that what we are dealing with is the failure on the part of the employer to pay moneys which have already been deducted and which axiomatically are freely available for payment to the Commissioner. Under the legislation, employers have 7 days after the end of the month in which to assemble and reconcile payment advices and to forward those, together with the appropriate payment, to the Commissioner.

30. In the circumstances, it is considered that remission should be available only where the failure to pay by the due date was caused by circumstances over which the employer had no control, i.e., circumstances envisaged by paragraph 221N(1) (a). These circumstances generally would encompass flood, fire or other natural disaster, serious ill health of the employer where no other person is available to ensure payment is made, mail strike, etc. Care must be taken to ensure that the circumstances relied on in fact prevented the employer from making the payment on time, e.g., a fire which destroys the

employer's business records necessitating some reconstruction to determine the exact amount required to be paid. In other words, the circumstances/disaster should not be viewed in isolation, but in the light of their effect on the physical ability of the employer to pay the deduction, bearing in mind always that the moneys should normally be available for payment.

31. Where the circumstances described in the above paragraph have occurred, a full remission of both the flat penalty and the late payment penalty may be granted.

32. As stated earlier in this ruling, tax instalment deductions are moneys which belong to employees and as such should always be available for payment to the Commissioner. It is difficult therefore to envisage any circumstances where it would be appropriate to remit late payment penalty, either wholly or in part, under paragraph 221 N(1)(b) (i.e., late payment caused by factors under the control of the employer). Nevertheless, the legislation does make provision for such remission and, by that fact, acknowledges that such circumstances may, however extreme, exist. In the event that such circumstances do arise, consideration will be given to each case on its merits.

33. For the same reason, remission under paragraph 221N(1)(c), the special circumstances limb, should be restricted to the specific circumstances outlined below (paragraph 35).

34. In summary, therefore, once the failure to pay has occurred without prior approval of the Taxation Office, it is difficult to envisage any circumstance in which further remission of penalty could be granted other than where the late payment was caused by factors beyond the control of the employer. Of course, the same consideration should be given to a government body employer as would apply to a non-government body employer.

Special Circumstances

35. Following the basis developed for income tax, a full remission of the penalty under the special circumstances criterion should be allowed in the following situations:

- (i) imposition of penalty is considered to be not worthwhile and would have no deterrent effect, e.g., penalty on finalisation of account calculated to be less than \$10; allowance of 7 days of grace for payments; or
- (ii) penalty has been imposed incorrectly due to an office error, e.g., payment posted to another employer's account.

Arrangements to Pay After the Due Date

36. Sub-section 221F(7) provides that the Commissioner may, by notice in writing served on a group employer, vary, in such

instances and to such extent as he thinks fit, any of the requirements of sub-section 221F(5).

37. By way of background, in framing the current extensions policy for income tax, the essential prerequisite to the granting of any extension was that the taxpayer should be able to clearly demonstrate an inability to pay the tax by the due date. Policy was developed to allow short-term extensions (up to 3 months) where the taxpayer provided a reasonable explanation of his inability to pay and to allow longer term extensions after careful and detailed consideration of the taxpayer's ability or potential to pay.

38. While the issues relevant to the determination of policy for further time to pay in respect of PAYE remittances are similar to those applying in respect of income tax debts there are several features unique to the PAYE System (and the Prescribed Payments System) which, in the end result, play a more important part in framing that policy.

39. Firstly, as already indicated, the nature of deductions from salary or wages is one of being trust moneys held on behalf of employees.

40. Secondly, the moneys deducted should be freely available for payment to the Commissioner at the time required.

41. Thirdly, it is in the nature of a monthly recurring debt that amounts outstanding can escalate quickly. The actions taken by this Office, therefore, should be such as to prevent any escalation of the amount outstanding.

42. In view of the nature of the debt, considerations of inability to pay are not relevant and on this basis, extensions of time to pay generally will not be granted.

43. However, the Taxation Office may, where special circumstances warrant, approve arrangements to pay which involve the deferment of legal action for a specified period without granting a formal extension of time. These circumstances are outlined in paragraphs 52 - 62.

Arrangements Subject to Penalty

44. Under the policy agreed upon for income tax debts, the granting of further time to pay is seen as an alternative to the Commissioner taking legal action against those persons who are unable to pay by the due date but who have the ability or potential to pay at some time in the future. It is not to provide the taxpayer with free use of funds. Accordingly, where further time to pay is granted it would normally be expected to be subject to additional tax from the original due date (the only exception being taxpayers who suffer serious financial hardship as a result of drought, flood, fire or other natural disaster).

45. It is considered that the general principle of granting

further time to pay subject to penalty (with certain exceptions) is equally valid in respect of tax instalment deductions.

46. The more critical issue in relation to PAYE though, given the higher level of penalties provided for in the legislation, is whether the full amount of penalty (both the flat penalty component and the per annum component) should be allowed to stand. It is suggested that this can be resolved by reference to the interpretation previously placed upon the construction of the penalties. That is, the flat component represents a penalty for the offence of late remittance and the per annum component represents "use of money".

47. It is considered that where an employer comes forward seeking further time to pay prior to the due date, or shortly thereafter but prior to departmental action to recover the amount outstanding (i.e., issue of demand for payment or inspection action to establish the debt), then he is attempting to avoid the offence. Accordingly, where an arrangement is granted to an employer it should be on the basis that the per annum component will stand but that the flat component will be remitted in full if he or she complies with the conditions of the arrangement.

Deferments of Legal Action

48. As pointed out in paragraphs 42 and 43 above, extensions of time to pay are not generally granted. If an extension of time were to be granted, it would effectively constrain liability to any penalty over the period of the extension as calculated in accordance with sub-section 221F(12). This latter sub-section refers to amounts remaining "unpaid after the time by which it is required to be paid" which, in the case of an extension, would be the extended due date. Therefore, any incentive to comply with the extension agreement may be minimal.

49. Accordingly, any arrangement should be viewed as a deferment of legal action only and subject to penalty on the basis described in paragraph 44 over the period of the deferment. In advising employers of the arrangements allowed, the words "extension of time to pay" should not be used. In addition, the employer should be advised that the flat component will be remitted in full where he/she complies with the conditions of the deferment.

50. Where a deferment arrangement is approved:

- (i) no legal action (such as the issue of a summons) will commence, or existing legal action will be suspended, until the specified date - called the "arrangement date"; and
- (ii) late payment penalty is imposed from the original due date of the payment.

51. Special arrangements will not normally be approved for

employers who have been prosecuted previously for failing to pay or who have a history of late payment (i.e., four final notices or more in the previous 12 months). Requests for arrangements to pay tax instalment deductions in respect of these employers will only be considered where exceptional circumstances such as those described in paragraph 60 exist.

Circumstances Under Which a Deferment of Legal Action
May Be Granted

52. In considering applications for further time to pay, two categories of employers can be identified:

- (i) those employers with no or only the current month's remittance overdue and who seek further time in respect of that current month's remittance only (i.e., short term deferments); and
- (ii) those employers with more than one remittance overdue or who seek further time covering more than one remittance (i.e., longer-term deferments).

(i) Short Term Deferments

53. With respect to the first group, deferments should only be granted where it would be unreasonable to insist on payment within seven days after the end of the month. For example, a deferment may be granted where a genuine delay is unavoidable because of administrative difficulties such as the number and localities of work sites, the payment details of which must be consolidated prior to the payment of the deducted amount. However, deferments in these cases should be subject to penalty as described in paragraph 47 and on the understanding that the employer is expected to resolve his administrative difficulties within a reasonable time to allow him to remit in future by the due date.

54. Applications for further time to remit amounts deducted for the month of December or January, on the basis of business closure during the holiday period, should be refused on the grounds that salary or wages would generally have been paid and deductions already calculated prior to closure over the Christmas/New Year period. Remittances for December and January should therefore be requested by the due date. Similarly, deferment requests for the months of June or July solely on the grounds of end of year accounting pressures should be denied.

55. Where further time is granted in the situations described in paragraph 52, it should not extend beyond the due date of the employer's next liability, i.e., the 7th of the next succeeding month. In essence therefore short-term deferments can be no longer than one month.

(ii) Long-Term Deferments

56. In relation to the second category of employers, applications for further time will normally be received against

the background of an employer who is struggling to maintain business viability or liquidity and who has allowed a number of payments to become outstanding so that relief in respect of these or future payments is necessary to sustain operations. In both instances, the employer will probably be in a position that he cannot immediately discharge the debt that he has incurred or will incur.

57. In these cases the options will be to either accede to the employer's request for further time, or refuse any further time and proceed to, or continue with, legal action (which may involve bankruptcy or winding-up proceedings).

58. The choice between the two options will be dependent on an assessment of the employer's ultimate ability to pay if he is allowed to continue in business. The objective should be to collect as much as practicable of the outstanding debt without recourse to legal action. Thus, if it appears that a reasonable payment arrangement in respect of the debt currently outstanding can be developed and adhered to by the employer then it would generally be appropriate to allow the employer to trade out of his difficulties. On the other hand, if it appears that little would be gained in terms of debt reduction from further time then recovery action will commence or be allowed to continue.

59. In the more serious cases, the ability or potential to pay will often have to be judged by reference to the actions of the employer's other creditors. Where the employer's creditors or suppliers have decided to stay recovery proceedings or extend further credit, it may be appropriate for the Taxation Office to adopt a similar position even though the debt may not be fully discharged for some time.

60. In any event, where further time is granted, it should be on the basis that the arrangement applies only to the current debt, i.e., all future monthly payments are to be paid by the due date, and secondly, that the debt must be progressively reduced in accordance with some reasonable instalment plan. Where during the operation of the instalment plan the employer fails to pay either one of the instalments or a future monthly payment, the arrangement should be suspended and legal action for recovery of the amounts outstanding proceeded with.

Employers Affected by Circumstances Beyond Their Control

61. In cases of employers in either category, deferment may be granted where the payment will be late because of circumstances beyond the control of the employer. Such circumstances include flood, fire or other natural disaster, ill health of the employer, mail strike, etc., but care should be taken to ensure that the circumstances did genuinely prevent the employer from making the payment on time, e.g., a fire which destroys all payment records and the employer needs time to determine the amount of remittance actually required. In other words, the circumstance/disaster should not be viewed in isolation, but in the light of its effect on the ability of the employer to pay the amounts deducted, bearing in mind always

that the moneys should normally be available.

62. In those cases where deferment is granted because of factors beyond the control of the employer, the deferment may be granted on the basis of a full remission of all penalties but subject to the employer making payment by the arranged date. If payment is not forthcoming by the arranged date then the employer should be expected to pay at least the per annum component of the penalty.

Permanent Deferments

63. Deferments or arrangements for further time to pay are not granted on a permanent basis. Where it can be demonstrated, however, that an employer is unable to resolve administrative difficulties (such as the number and localities of work sites) within a short period, a deferment of up to 30 days for each month's payment, may be granted for the succeeding 3 months.

64. The arrangement will be reviewed at the expiration of the 3 month period to determine whether or not the employer has taken steps to overcome the problem. Where the employer has not taken appropriate corrective action, further deferments should not be granted.

65. Where delays are attributable to factors peculiar to particular situations, e.g., infrequent mail services at remote locations, the review period may be extended to a maximum of 12 months, and the review may be limited to confirming whether or not the particular situation continues to exist.

Deferments for Employers Receiving Government Assistance

66. There are no circumstances in which the Taxation Office could be justified in withholding recovery action against a group employer while further debts are accumulating. In particular, there is no obligation upon the Taxation Office to withhold action because the employer, for one reason or another, is in receipt of government assistance. The practical effect of such a withholding of action would be to make an unauthorised advance to the employer out of moneys deducted from employees' wages to help overcome the employer's business difficulties. If the government officials seeking to help the employer remain in business have authority to assist the employer financially, the onus is on them to provide enough money to enable both the net wages and the amounts deducted for tax to be paid. Otherwise, the Taxation Office would in effect be increasing the extent of the government assistance determined by the authorised officials.

Estimated Payments

67. In general, estimated payments will not be accepted as an alternative to granting an arrangement to pay. Estimated payments are not specifically sanctioned by the law which does, however, provide for additional time. Nevertheless, there may be some special circumstances in which it is preferable to accept an estimate than to grant further time, e.g., if there

is doubt as to the continued financial stability of the group employer. Cases of this nature are, however, to be kept to a minimum.

Application of Payments

68. Payments which are received in situations where multiple months are involved, should be allocated such that the result will best serve the interests of the employer. Payments should be applied to debts in order of occurrence, i.e., to the principal amount and the flat penalty first and then to the accruing penalty. For example, if there were three months payments outstanding, payment would be allocated as follows:

MARCH	APRIL	MAY
1. Principal Amount plus flat penalty	2. Principal Amount plus flat penalty	3. Principal Amount plus flat penalty
4. Accruing Penalty	5. Accruing Penalty	6. Accruing Penalty

COMMISSIONER OF TAXATION
9 July 1985

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