IT 2210 (as amended 15/4/86) - Income tax: deductions from prescribed payments (PPS) - remission of penalties - failure to deduct

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Generated on: 30 November 2026, 03:30:23 AM

TAXATION RULING NO. IT 2210 (as amended 15/4/86)

INCOME TAX: DEDUCTIONS FROM PRESCRIBED PAYMENTS (PPS) - REMISSION OF PENALTIES - FAILURE TO DEDUCT

F.O.I. EMBARGO: Edited for FOI Purposes

REF H.O. REF: S.104/1/65 85/3024-6 DATE OF EFFECT: IMMEDIATE

B.O. REF: DATE ORIG. MEMO ISSUED:

F.O.I. INDEX DETAIL

REFERENCE NO:	SUBJECT REFS:	LEGISLAT. REFS:
I 1124119	FAILURE TO MAKE DEDUCTIONS FROM PRESCRIBED PAYMENTS	221YHH 221YHL
	PENALTY IMPOSITION AND REMISSION	

PREAMBLE Where an eligible paying authority (payer) other than a government body, makes a prescribed payment to a payee without first making a deduction that is required to be made in accordance with section 221YHD, the payer is liable to a penalty pursuant to sub-section 221YHH(1). This provision automatically comes into effect as soon as there has been a failure or refusal to deduct the relevant amount, i.e., there has been an under deduction or a complete failure to deduct.

2. This ruling provides guidelines for the exercise of the Commissioner's discretion under section 221YHL to remit the statutory penalties imposed by section 221YHH. 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. The guidelines in this ruling have been dealt with under the following headings :

(i) determination of the amount the payer failed to deduct;

(ii) calculation of penalty;

(iii) flat penalty;

(iv) late payment penalty; and

(v) other matters.

3. There are two components to the statutory penalty referred to in the above paragraphs. The first, imposed by paragraph 221YHH(1)(a), is an amount equal to the amount the payer failed to deduct (the undeducted amount). For reasons

which he thinks sufficient the Commissioner is able to remit the whole or any part of this fixed element of the penalty (sub-section 22YHL(2)). Paragraph 221YHH(1)(b) imposes the second component (the late payment element). This component is an amount equal to 20% per annum of so much of the undeducted amount as remains unpaid, calculated from the date when the deduction, if it had been made as required, should have been paid. A power to remit this late payment element of the penalty is available under sub-section 221YHL(1) in circumstances that parallel those in sub-section 207(1A) which provides for remission of additional tax imposed on unpaid income tax.

4. Where a payer, being a government body other than the Commonwealth, makes prescribed payments without first making a deduction as required, the payer is liable to a penalty pursuant to sub-section 221YHH(2).

5. The penalty referred to in paragraph 4 above is an amount equal to 20% per annum of the undeducted amount calculated in respect of the period commencing on the 15th day of the month following the month in which the deduction should have been made and ending on the day when all of the amount payable in respect of the undeducted amount is paid. Where the government body has been granted an extension under sub-section 221YHD(2) and a failure to deduct has occurred, that extension will not apply for penalty calculation purposes.

6. In the absence of extenuating circumstances, such as those outlined in paragraphs 22-24 of this ruling, the full amount of the penalty as provided by the legislation should be allowed to stand for government body payers. Where extenuating circumstances exist, the same consideration should be given to a government body payer as would apply to a non-government body payer. Any request for remission of penalty pursuant to sub-section 221YHH(2) must be considered under the provisions of sub-section 221YHL(2).

RULING

Determination of the amount the payer failed to deduct

7. In determining the amount the payer failed to deduct for the purpose of deciding the level of penalty, consideration should be given to the cost effectiveness of the examination required to establish all relevant details.

8. Extension of the normal examination period should be limited, and should not be considered warranted without first having regard to whether :

(a) aggravating factors are present;

(b) substantial undeducted amounts have come to light from an examination
;

(c) any non-deduction detected during the examination period is likely to be absolved in part or full due to extenuating circumstances; or

(d)

9. For the purpose of deciding whether to extend the initial examination period, it is considered that substantial undeducted amounts should be seen as .

10. Regarding the duration of an extended examination period, it has been decided that a further period

represents the best balance between the need to ensure that the level of penalty imposed is an adequate deterrent to further offences, but at the same time is not too harsh, and the need to be conscious of the time and effort required to extend examinations. Only in extreme circumstances should the examination period be further extended.

11. Accordingly, where aggravating factors are present or an initial examination discloses undeducted amounts and there are no extenuating circumstances, the examination is to be extended, wherever practicable, to cover a

or the period from when the payer was previously prosecuted, penalised or warned, whichever is the lesser period.

Calculation of Total Penalty

12. In calculating the penalty to be imposed for failure to deduct, there are two base amounts which must be taken into account, viz:

X - the flat penalty after remission; and

Y - the flat penalty after remission which remains unpaid.

Flat penalty in terms of sub-section 221YHH(1) is defined as the "undeducted amount".

13. Using these codes, the formula for calculation of penalty in respect of failure to deduct can be expressed as follows:

FLAT COMPONENT LATE PAYMENT COMPONENT

$$X + \frac{20}{100} \times \frac{n}{365} \times Y$$

Note: Y = X in all cases, except where part payment of X has been made;

and

n = the number of days late, computed from the

expiration of the period within which the amount that the payer failed to deduct would have been required to be paid to the Commissioner to the date of payment .

14. The reference in paragraph 221YHH(1)(b) to "so much of the undeducted amount as remains unpaid" has been interpreted to mean (subject to any payments made) that amount of flat penalty remaining unpaid after remission.

FLAT PENALTY

15. The discretion under sub-section 221YHL(2) to remit amounts payable under paragraph 221YHH(1)(a) is to be exercised in accordance with the guidelines set out in paragraphs 16-24.

Basic Flat Penalty

16. Unless there are aggravating factors (see paragraph 18) or extenuating circumstances (see paragraph 22), the statutory penalty is to be reduced to a basic penalty of 40% of the "undeducted amount" in all cases of failure to deduct falling within paragraph 221YHH(1)(a). This basic penalty assumes a reasonable degree of co-operation with official enquiries and is considered to be appropriate having regard to the following factors:

(a) it represents an effective deterrent so as to ensure that there is maximum compliance with the requirement to deduct tax at source;

(b) it ensures that the payer is encouraged to ascertain his obligations while, at the same time, sufficient "penal" flexibility exists to take account of the different circumstances which will be encountered;

(c) payers who do not comply will not be seen to be benefitting economically at the expense of those who do. By imposing a minimum or base penalty for all cases of non-deduction, the incentive for risking detection by the Taxation Office is reduced; and

(d) the basic penalty aligns with the rate of penalty imposed for non-deduction under the pay as you earn system thereby facilitating comparable treatment for comparable offences.

17. The basic penalty and minimum inspection period, therefore, should be adjusted according to whether aggravating or extenuating circumstances are present.

Aggravating Factors

18. The basic penalty is to be increased by a further percentage of the undeducted amount, depending on the degree of

seriousness of the particular offence but within the range of percentages indicated, for each of the following circumstances that exist:

(a) Deliberate steps have been taken, either before or after commencement of official enquiries, to conceal the true character of a contractual arrangement or the identity of a payee - 20% to 50%.

(b) The above steps may be construed as involving corruption of, or collusion with, a payee - 20% to 50%.

(c) The payer has on a previous occasion been warned in writing, penalised or prosecuted for failure to make deductions from prescribed payments - 20% to 50%.

(d) The degree of co-operation is less than "reasonable" or such as to cause excessive delay in the completion of official enquiries - 20% to 50%.

19. In determining the level of penalty each of the aggravating factors listed above should be considered separately. The actual percentage selected from the range 20% to 50% should reflect the degree of culpability or, in the case of (d), resistance to official enquiries. It is expected that the greater part of these offences would fall within the 20% to 30% range with the higher end of the range being reserved for the most extreme cases.

20. Regarding item (c), which is concerned with the commission of previous offences, it is considered that the current offence under consideration should be treated as warranting a penalty greater than the basic penalty only if the prior warning, penalty or prosecution occurred within

21. Care should, of course, be exercised to ensure that the penalty calculated in accordance with the above guidelines does not exceed the statutory maximum of 100% of the undeducted amount.

Extenuating Circumstances

22. The basic penalty may be decreased in extenuating circumstances. It is not possible to specify all those situations where it is considered that further remission is warranted but in broad terms they will be situations where, more often than not because of a combination of circumstances rather than a single circumstance, the payer's offence is considered wholly or substantially excusable. Thus, while no one factor such as carelessness, ignorance, serious ill health or advanced age would normally warrant further remission, the presence of two or more such factors might well amount to extenuating circumstances warranting a reduction in penalty.

23. Subject to these comments, circumstances where a further remission would be warranted would include cases where it is clear that:

(i) the payer's offence was occasioned by carelessness of a less serious nature and there are other mitigating factors, e.g., advanced age or serious illness, which excuse the carelessness to a substantial extent;

(ii) the payer's offence was occasioned by ignorance of the law in the sense that, in the particular circumstances, the payer could not reasonably be expected to have been aware of the requirements in question;

(iii) the payer has made a genuine and excusable mistake in interpreting the law, i.e., there was a genuine belief by the payer that deductions were not required;

(iv) there is a serious and genuine dispute as to whether the payment is for work consisting of an activity to which sub-regulations 54 ZEB(2) or (3) apply, or whether the payment is to a prescribed person as defined in sub-regulation 54 ZEB (4).

(v) the effect of the penalty, having regard to the payer's net assets and his potential earning capacity, would be such as to amount to a "ruinous imposition", i.e., leave the payer with little or no remaining assets.

24. In cases such as these the circumstances will have been considered sufficient to warrant a further reduction of the penalty on the grounds that the payer's offence is wholly or substantially excusable. In a case where the offence is considered substantially, but not wholly, excusable, a reduction in the basic penalty to, say, 20% might be appropriate. In a case where the circumstances are such that the payer's offence is wholly excusable, the whole of the penalty may be remitted.

LATE PAYMENT PENALTY

Level Of Penalty To Be Imposed In The First Instance

25. The penalty for failure to deduct comprises a flat penalty in respect of the offence itself, and a per annum penalty to take account of the delay in collecting the revenue. The comments below relate only to the level of the late payment component to be imposed in the first instance, which will be additional to the amount of flat penalty as provided for in the preceding guidelines.

26. In deciding the level of late payment penalty in respect of an undeducted amount, any consideration of the payer

holding trust moneys on behalf of payees is obviously not relevant.

27. The paramount consideration in this situation is the loss incurred by the Government by not having moneys, which should have been deducted and remitted, available for use. The question to be answered therefore is whether there should be any remission of the per annum component.

28. As indicated previously, remission of the late payment penalty component for failure to deduct and for failure to pay is provided for under the same sub-section, i.e., sub-section 221YHL(1). In summary, for a remission to be granted, the payer must be able to demonstrate, firstly, that because of certain circumstances he was unable to pay the deductions when they fell due and, secondly, that he has made all reasonable efforts to mitigate, or mitigate the effects of, those circumstances. Alternatively, remission may be granted where there are special circumstances considered by the Commissioner to warrant it.

29. There is some difficulty in applying the legislative remission guidelines based on circumstances contributing to a "delay in payment" in a failure to deduct situation. The fact is that nothing caused the delay in payment other than the payer's failure to deduct amounts as required. Accordingly, it would seem more appropriate to consider remission in terms of the factors which led to the failure to deduct.

30. In this regard, and bearing in mind that the flat penalty component to be imposed already provides for a partial remission based on the circumstances surrounding the failure to deduct, it has been decided that the per annum component should generally be allowed to stand in full, i.e., 20% per annum of the flat component deemed payable after remission. This would also be consistent with the policy as suggested for failure to pay.

Requests For Remission Of Penalty After Imposition

31. As the circumstances warranting remission would normally be evident at the time of raising the penalty and again bearing in mind that these circumstances would have been taken into account in determining the level of flat penalty on which the per annum component is based, it is suggested that no further remission of the per annum component be granted. If it transpires, as a result of a request for remission, that the flat penalty is to be reduced, the per annum penalty would also be reduced as a direct consequence of the calculation formula. Where the flat penalty is remitted in full, no per annum penalty would be payable.

Other matters

32. To enable the extent of penalty remissions to be determined by supervisors, officers are required to comment specifically and separately in their reports and penalty submissions on the extent to which aggravating factors or extenuating circumstances exist. In determining the extent of

penalty remissions, approving officers exercising the Commissioner's discretion should clearly state the reasons for their decisions. This action will be necessary for the proper investigation of complaints regarding penalties by, or on behalf of, payers and for Head Office monitoring purposes.

33. Where a decision is made to remit part only, or not to remit any part, of the statutory penalty, approving officers should ensure that the payer is notified in writing of the decision. Officers preparing penalty submissions and approving officers are to ensure that decisions concerning the remission of penalty are made promptly.

34. Where the whole of the statutory penalty is remitted, approving officers should ensure that the payer is notified in writing of the decision and warned that any similar offences in the future will not necessarily result in a full remission.

COMMISSIONER OF TAXATION
8 November 1985