

SGR 94/2 - Superannuation guarantee: extension of time under the Superannuation Guarantee (Administration) Act 1992 (SGAA)

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Superannuation Guarantee Ruling

Superannuation guarantee: extension of time under the *Superannuation Guarantee (Administration) Act 1992* (SGAA)

other Rulings on this topic

IT 2569

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Superannuation Guarantee Rulings do not have the force of law. Each decision made by the Australian Taxation Office is made on the merits of each individual case having regard to any relevant Rulings and Determinations.

What this Ruling is about

1. This Ruling provides guidelines on the circumstances in which the Commissioner will exercise his discretion to grant an extension of time under the SGAA in which:

- (a) to lodge a superannuation guarantee statement;
- (b) to pay the superannuation guarantee charge; or
- (c) to obtain a benefit certificate.

2. This Ruling does not deal with superannuation contributions. The Commissioner does not have a discretion to extend the time in which an employer can make superannuation contributions. An employer who has not made sufficient superannuation contributions will have to pay the superannuation guarantee charge.

Background

Superannuation guarantee statement

3. Section 33 of the SGAA requires an employer who has a superannuation guarantee shortfall to lodge a superannuation guarantee statement for a year by 14 August in the following year or on any later day allowed by the Commissioner.

Payment of the superannuation guarantee charge and the additional superannuation guarantee charge

4. If an employer does not provide the minimum level of superannuation support for employees, the employer will have to pay the superannuation guarantee charge.

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5. The superannuation guarantee charge is payable either on 14 August, if the employer lodges a superannuation guarantee statement on or before that day, or on the day the statement is lodged (section 46).

6. Any additional superannuation guarantee charge imposed under Part 7 of the SGAA becomes payable on the day specified in the notice of assessment of the additional superannuation guarantee charge.

7. Subsection 48(1) of the SGAA gives the Commissioner the power to extend the time for payment of an amount of superannuation guarantee charge, including any additional superannuation guarantee charge payable under Part 6 or Part 7.

Benefit certificate

8. The SGAA requires an employer who has made contributions to a defined benefit superannuation scheme to obtain a benefit certificate from an actuary (sections 10 and 22).

9. A benefit certificate may be issued in a period commencing on 1 July in a particular year and ending on 14 August in the following year or a later date allowed by the Commissioner (subsection 10(5)).

Ruling

Discretion of officers

10. These guidelines do not restrict officers, but are provided to assist them in exercising the discretion to grant extensions of time under the SGAA and to help ensure that employers receive consistent treatment.

11. The facts of each particular case must be considered when exercising the power to grant extensions of time. Officers should retain a written record of the factors that they have taken into account when exercising the discretion.

12. The guidelines have also been designed to give effect to the intention of the legislature when enacting the SGAA and to complement the overall collection and recovery policy of the ATO.

13. It is important to keep in mind that the SGAA has to be administered in the context of the realities and practicalities of employers fulfilling their superannuation guarantee obligations, particularly during the first year (1992-93) of operation of the SGAA.

14. Some of the factors that should be taken into account in determining whether or not to grant an extension of time are listed in this Ruling. However, *the lists are not intended to be exhaustive; they are merely illustrative. Not all factors will be present in every case and some factors will carry more weight in particular circumstances.* In the final analysis, the responsibility rests with authorised officers to apply the law to the facts and circumstances of each case, in light of these guidelines, and in a consistent manner.

15. The Commissioner may grant an extension of time when an employer provides the Commissioner with detailed reasons. *For example, if the employer does not provide reasons the Commissioner has no basis on which to exercise his discretion in favour of the applicant.*

Form of application

16. Although the SGAA does not specify any particular form that the application for an extension should take, all requests for extensions of time are required to be in writing. *Requests in writing provide a record of the reasons and these may be useful for future reference or in any dispute that arises, particularly if the Commissioner does not grant the extension of time sought*

17. Generally, it is expected that an extension of time would be sought prior to the due date, although there will be cases where an application for an extension is made at a later date. *An application for an extension received after the due date will require more detailed reasons, including reasons for the delay (see paragraph 23).*

Commissioner's decision

18. The employer should be advised, in writing, of the Commissioner's decision.

Blanket extensions

19. Blanket extensions of time to employers in a particular industry or region can be granted only in exceptional circumstances. *For example, this may be appropriate where a representative industry body has agreed to seek judicial clarification of a matter which affects the entire industry.*

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Extensions of time in which to lodge a superannuation guarantee statement

20. An employer who has not made sufficient superannuation contributions must lodge a superannuation guarantee statement and pay the superannuation guarantee charge.

21. The Commissioner may grant an extension of time in which to lodge the superannuation guarantee statement if the employer applying for the extension can establish reasons for the delay in lodging.

22. If an employer is required by the ATO to produce documents for the purposes of an audit, this does not mean that an automatic extension of time to lodge a superannuation guarantee statement will be granted. An employer in these circumstances will still need to apply for an extension of time.

23. The following circumstances may be relevant in making a decision on a request for an extension of time in which to lodge the superannuation guarantee statement (refer to paragraph 14):

- whether the length of the extension sought is reasonable in the circumstances;
- exceptional or unpredictable events. *For example, serious ill health of the employer so that it was not possible to lodge by the due date; loss or destruction of employer records due to fire or flood etc;*
- circumstances which are/were clearly beyond the control of the employer. *For example, if the employer has made superannuation contributions into a fund on behalf of employees but because the employee has refused to sign the documents necessary for the fund to process the contributions, the trustee of the fund has returned the contributions to the employer; or if the previous owner of the business would not release the books;*
- a reasonable misunderstanding of the requirements of the SGAA in regard to the lodgement of the superannuation guarantee statement, together with action by the employer to mitigate the effects of the late lodgement. *For example, the employer may agree to lodge the statement within 1 week of the request (or within a reasonable time);*
- if payment in full of the superannuation guarantee charge is agreed upon lodgement;
- if the request for the extension of time is as a result of ATO audit activity this may be a factor against granting the extension;

- lodgement history. *For example, does the past record of the employer indicate an unsatisfactory level of compliance in relation to lodgement of the superannuation guarantee statement or other taxation returns?*
- whether the request was in the 1992/1993 year, the first year of operation of the SGAA. The newness and complexity of this legislation made it difficult for some employers to understand and satisfy all of the requirements. *The efforts of each employer to comply with the legislation should be considered in each case.*

Nominal interest component of the superannuation guarantee charge

24. When the Commissioner grants an extension of time in which to lodge the superannuation guarantee statement, the automatic nominal interest component continues to accrue until the superannuation guarantee statement is lodged. (If the charge is not paid in full at that time, a late payment penalty applies.)

Late lodgement penalty

25. If an employer is granted an extension of time in which to lodge the superannuation guarantee statement, the late lodgement penalty imposed by subsection 59(1) of the SGAA does *not* apply if the employer lodges the statement within the extended time.

Extensions of time in which to pay the superannuation guarantee charge including any additional superannuation guarantee charge

26. The Commissioner may agree to an extension of time for payment of the superannuation guarantee charge. Alternatively, the Commissioner may grant an extension of time to pay part of the superannuation guarantee charge.

Temporary financial difficulties

27. The Commissioner would usually only grant an extension of time in which to pay the superannuation guarantee charge if the employer applying for the extension can establish that insufficient funds are available to pay the charge. The employer must establish that:

- all avenues for obtaining liquid funds necessary to pay the charge have been exhausted. *For example, a total lack of cash reserves, claims to cash, recourse to borrowings,*

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ownership of realisable assets etc at that time. (Extensions should not be granted merely because an employer is unable to produce liquid funds quickly or finds it unprofitable or inconvenient to do so); and

- the liability cannot be discharged when it falls due.

28. Extensions of time for payment should be seen as an alternative to legal action in respect of an employer who is clearly unable to pay the debt when it falls due but has the ability or potential to pay at some time in the future. (The motivation for seeking an extension of time should be an inability to pay rather than an unwillingness to pay or a desire to delay the institution of legal recovery action.)

29. Consequently, when an extension of time for payment is granted, recovery action will normally be held in abeyance but should recommence if the employer defaults on the terms of the extension. *Employers should be advised of this whenever an extension of time to pay is granted.*

30. Even if the employer has demonstrated an inability to pay by the due date, an extension should only be granted if the employer can demonstrate that within the period for which an extension may be granted, the employer will have the ability or potential to pay the charge. *For example, the employer may have future claims to cash, improved seasonal trading conditions etc.*

31. The ability or potential ability to pay can often be judged by reference to the action taken by the employer's other arm's length creditors. *For example, the employer's creditors may have decided to stay recovery proceedings.*

32. In many cases extensions of time to pay the superannuation guarantee charge are sought where business operations are involved. If it is established that the difficulties which caused the inability to pay the charge are not permanent and that the business has good prospects of successfully trading out of its difficulties an extension of time may be granted.

33. A full assessment of the employer's financial position may need to be undertaken. *For example, it may be necessary to establish if the employer has other outstanding tax debts.*

34. The fact that an employer receives Government assistance in the form of loans because of financial difficulties does not stop the other factors listed in this Ruling from being taken into account.

35. The question of whether or not extended time for payment is granted is one for the Commissioner to determine and until such time as the Commissioner notifies the employer to the contrary, the amount of the superannuation guarantee charge outstanding remains due and payable on the date specified.

36. The employer must be advised in writing of the Commissioner's decision to extend the time for payment of the charge, with a request that a copy be included with the employer's superannuation guarantee statement unless the statement has already been lodged.

Other circumstances to be taken into account

37. Even if the employer is able to pay the superannuation guarantee charge, the Commissioner may grant an extension of time in which to pay if other circumstances, apart from financial circumstances, prevent an employer paying by the due date. Relevant factors might include:

- circumstances beyond the employer's control, such as natural disasters;
- the employer or a dependant may be seriously ill;
- the employer may be on an unavoidable overseas business trip;
- geographical remoteness of the employer which may prevent access to ATO business premises. *For example, this may result in a short extension of time being granted;*
- length of the extension sought. *For example, extensions of time beyond one year (ie the expected date of the employer's next liability) will generally only be granted where the employer can demonstrate that provision has been made for the payment of that liability;*
- whether the request was in the 1992/1993 year, the first year of operation of the SGAA. The newness and complexity of this legislation makes it difficult for some employers to understand and satisfy all of the requirements. *The efforts of each employer to comply with the legislation should be considered in each case;*
- the past record of the employer;
- whether the granting of an extension of time to pay would be equivalent to the business receiving a loan not available to its competitors so that the extension of time could be seen as giving the business an unfair advantage.

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Further extensions of time for payment of the superannuation guarantee charge

38. The granting of further time for payment could be made conditional upon the superannuation guarantee charge for future years being paid by the due date. *For example, an employer may have been granted an extension of time to pay the superannuation guarantee charge for the 1992-93 year, on the condition that if a charge is payable in the 1993-94 year, it is paid by 14 August.*

Continuing extensions

39. Permanent or continuing extensions for further time to pay should not be granted. Each annual superannuation guarantee charge liability should be viewed on its own merits and a decision made on the basis of the circumstances at the time the request for an extension is made.

Extensions of time in which to obtain a benefit certificate

40. The Commissioner may grant an extension of time in which an employer can obtain a benefit certificate if the employer applying for the extension can provide reasons for the delay in obtaining the benefit certificate.

41. The following circumstances may be relevant in making a decision on a request for an extension of time in which to obtain a benefit certificate (see paragraph 14).

- no knowledge of the need to obtain a benefit certificate;
- whether the request was in the 1992/1993 year, the first year of operation of the SGAA;
- the Superannuation Guarantee (Administration) Regulations were not gazetted until 27 April 1993. The Regulations provide the formula for working out the notional employer contribution rate;
- previous owner of a business would not release the books;
- actuary made an error in the original benefit certificate;
- a belief that the benefit certificate will show that the minimum benefit has been provided.

Relationship between the need to obtain a benefit certificate and the requirement to lodge a superannuation guarantee statement.

42. If the Commissioner does extend the date by which an employer can obtain a benefit certificate, he will also extend the date for lodging the superannuation guarantee statement.

43. If the benefit certificate contains a notional employer contribution rate such that the employer will not have a superannuation guarantee shortfall, the employer will not need to lodge a superannuation guarantee statement. However, the employer will be protected in the event that the notional employer contribution rate on the benefit certificate is less than the employer's charge percentage.

Date of effect

44. This Ruling (that is, the final Superannuation Guarantee Ruling based on this Draft) sets out the current practice of the Australian Taxation Office and is not concerned with a change in interpretation. Consequently, it applies from the time the legislation commenced to operate.

Commissioner of Taxation

11 August 1994

ISSN 1038 - 7463

ATO references

NO 93/6406-4

BO

Previously released in draft form as
SGR 94/D2

Price \$0.90

FOI index detail

reference number

I 1014382

subject references

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legislative references

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