



SGR 94/3 - Superannuation guarantee: remission of penalties under Part 7 of the Superannuation Guarantee (Administration) Act 1992 (SGAA)

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Superannuation Guarantee Ruling

Superannuation guarantee: remission of penalties under Part 7 of the *Superannuation Guarantee (Administration) Act 1992* (SGAA)

other Rulings on this topic

IT 2517; IT 2475; TR 92/10;
TR 94/6

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.

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What this Ruling is about

1. This Ruling explains the circumstances under which the Commissioner will exercise his discretion under subsection 62(3) of the SGAA to remit all or part of the additional superannuation guarantee (SG) charge payable by an employer under Part 7 of the SGAA.

2. The Commissioner's policy in exercising his discretion under this provision is to encourage voluntary disclosures and co-operation by employers. This is the guiding principle to be used when applying the provision.

Background

Part 7 penalties

3. Under Part 7 of the SGAA, an additional SG charge, by way of penalty, is payable by an employer:

- for failing to lodge a SG statement or to provide information, on time (subsection 59(1)),
- for failing to keep certain records (subsection 59(2)),
- for making a false or misleading statement (subsection 60(1)), or
- for entering into an arrangement to avoid the SG charge (section 61).

4. The penalty imposed in each of these cases is related to the *SG charge*. This is the sum of:

- the total individual employee shortfalls *plus*

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- a nominal interest component *plus*
- an administration component.

Applicable penalty

5. The penalty for failing to provide statements or information, or for failing to keep certain records is 200% of the amount of SG charge payable by the employer in the year.
6. The penalty for making a false or misleading statement which results in a reduced superannuation guarantee charge is 200% of the charge understated or avoided.
7. The penalty for entering into an arrangement to avoid the SG charge is 200% of the amount of the charge avoided.

Extension of time to lodge

8. Where an employer has been granted an extension of time to lodge a SG statement, the late lodgement penalty (subsection 59(1)) will not apply. **Note that the nominal interest continues to accrue until the statement is lodged.**

Power to remit penalty

9. Under subsection 62(1) of the SGAA, the Commissioner must make an assessment of the penalty payable under Part 7. Subsection 62(3) gives the Commissioner the power to remit all or part of the penalty payable.

Late payment penalty

10. Under section 49 of the SGAA, a late payment penalty applies if the SG charge (including penalties) is not paid when the statement is lodged.
11. The Commissioner does not have the power to remit the late payment penalty.

Ruling

Discretion of officers

12. These guidelines do not restrict officers, but are provided to assist them in exercising their discretion to remit the additional charge, and to help ensure that employers receive consistent treatment.

13. The facts of each particular case must be considered when exercising the power to remit. Officers must retain a written record of the factors they have taken into account when remitting the penalty.

14. It is important to keep in mind that the legislation has to be administered in the context of the realities and practicalities of employers fulfilling their SG obligations, particularly during the first year (1992-93) 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 when remitting the penalty.

15. Some of the factors that should be taken into account in determining the appropriate level of the penalty are listed in paragraphs 19 to 22. However, **the lists are not intended to be exhaustive**; they are merely illustrative. In the final analysis, the responsibility rests with authorised officers to apply the law to the facts and circumstances of each case, in the light of these guidelines, and in a consistent manner.

Calculation of the penalty

16. This Ruling proposes that officers work out the appropriate level of penalty, and then remit the difference between that level and the level imposed in the legislation.

17. The penalty for making a false or misleading statement, for entering into an arrangement to avoid the SG charge, or for failing to keep records, would typically be made up of:

- a culpability component; and
- a hindrance component

to a maximum of 200% of the SG charge avoided or the SG charge payable for the year, whichever is applicable.

18. The penalty for failing to lodge a SG statement or provide information on time would typically be made up of:

- a culpability component;
- a hindrance component;
- a recurring offence component of 5% (cumulative) per annum; and
- a flat 10% non-lodger component (see paragraph 24); to a maximum of 200% of the SG charge avoided or the SG charge payable for the year.

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Culpability component

19. The culpability component is included to penalise employers for unacceptable behaviour. It reflects the gravity of the offence or the wrongdoing of the employer. Subject to the above comments on the discretion of officers, the more common factors to be considered and suggested rates of penalty when applying the culpability component are:

Carelessness	25%
Failure to follow the written advice of the ATO when self assessing	25%
Recklessness	50%
Deliberate evasion	75%

Only one of the above rates is applicable when determining the culpability component. If the employer exhibits more than one of the above culpable behaviours, then the penalty rate relating to the most culpable behaviour applies.

20. The culpability component is applicable even if the culpable behaviours were the actions of a representative of the employer.

21. The culpability component may be reduced, even to nil, where:

- the employer has been misled in writing by the ATO,
- the employer did not know (and could not reasonably be expected to know or have suspected) that the statement needed to be lodged, or that the statement was false or misleading, or
- the employer made an inadvertent error or honest mistake.

Hindrance component

22. The hindrance component is designed to encourage the co-operation of the employer during the audit process. The more common factors to be considered when applying this component are:

Lack of reasonable co-operation, causing excessive delay and/or obstruction or hindrance	20%
Taking deliberate steps to conceal information during the audit	75%

Only one of the above rates can apply to each transaction. If the employer exhibits both of the above behaviours, then the penalty rate relating to the more serious behaviour will be attracted.

Recurring offence component

23. In cases where an employer fails to lodge a statement, a recurring offence component will be applied on a cumulative basis to all further consecutive late statements. That is, the recurring offence component would be 5% for the second consecutive year, 10% for the third consecutive year, and so on. It is applied to the SG charge payable.

Non-lodger component

24. The non-lodger component is a flat 10% penalty that applies where the employer fails to lodge a SG statement, and this failure is discovered by ATO actions.

Voluntary disclosure

25. Employers who voluntarily disclose their non-compliance before the Commissioner commences an audit of their affairs could generally expect to have the penalty reduced by 80% of the penalty calculated.

26. Employers who voluntarily disclose their non-compliance after the Commissioner has informed them that an audit was to be carried out will have the penalty reduced by 20% of the penalty calculated.

Explanations***Carelessness***

27. An employer is careless when he or she does not take the care that a reasonable, ordinary person would have taken in the same circumstances. Reasonable care requires the employer to make reasonable enquiries to resolve an issue.

Recklessness

28. An employer is reckless if he or she takes what a reasonable person would regard as an unjustifiable risk or acts without regard for the consequences of the action.

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Deliberate evasion

29. Deliberate evasion requires an intention of getting around the obligations of the SGAA by entering into an arrangement to avoid the charge, or by deliberately:

- failing to lodge a statement or provide information,
- failing to keep certain records, or
- making a false or misleading statement.

Inadvertent error/honest mistake

30. If the employer has made an obvious attempt to meet his or her SG obligations but in doing so made an honest error or omission, producing a result that the employer could not reasonably be expected to recognise as incorrect, then an inadvertent error or honest mistake has been made.

Reasonable co-operation

31. In general terms, reasonable co-operation amounts to:

- an employer answering all relevant and reasonable questions, 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 employer's circumstances.

32. Reasonable co-operation does not require that an employer agree with a tax officer's views. What it requires is the timely provision of information, not acceptance of a particular interpretation of that information.

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

- actions which have caused excessive delay in the completion of official enquiries,
- resort to delaying tactics, or
- failure to adhere to appointments with the ATO without due excuse.

Voluntary disclosure

34. The employer's disclosure must be in writing and give a full and true statement of all the relevant material facts that will enable a correct assessment of the employer's liability in respect of the matter that is disclosed.

35. To qualify for the 80% reduction in penalty for voluntary disclosure, the disclosure must be made **before** the employer or the employer's representative is informed that an audit has commenced into the employer's affairs.

36. The 20% reduction in penalty for voluntary disclosure applies if the disclosure is made **after** the employer or the employer's representative has been informed of the audit, but before detailed enquiries are commenced into the matter disclosed so as to have saved significant time and resources in the audit.

37. The time when an employer is taken to have been informed of an audit is the time when the ATO first contacts the employer or the employer's representative about an audit for a particular year.

Full and true disclosure

38. If the disclosure is incomplete, but the degree of incompleteness is insignificant and has no or little material effect on the processing of the disclosure, the case may still be treated as a disclosure which qualifies for the reduced rates of penalty.

Partial disclosure

39. If an employer discloses one part of a shortfall because he or she is only aware of that part of the shortfall and the disclosure on that part of the shortfall is full and true, the employer is entitled to benefit from the reduced penalty rates in respect of the part of the shortfall disclosed. The part or parts of the shortfall not disclosed would continue, if appropriate, to attract penalty at the normal (non-reduced) rates.

40. If an employer's disclosure is not sufficiently complete then the disclosure will not qualify for a reduction in penalty.

Examples

41. The following examples are intended as a guide only. The rate of interest is for illustrative purposes only.

Example 1 (Carelessness, false & misleading statement)

On 14 August 1993, Denise lodged and paid the full charge payable on the SG statement for the 1992-93 year.

On 1 December 1995, the ATO advised Denise that her affairs for the 1992-93 year were to be audited.

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On the next day, Denise wrote to the ATO and said, "My SG statement shows that the shortfall for my employee, Alison, was \$170. It was actually \$320 and the additional interest component was \$50".

The auditor took the following factors into account when calculating the penalty:

- A Part 7 penalty for making a false or misleading statement is applicable; and
- Denise's tax agent was careless in miscalculating the shortfall, but Denise co-operated during the audit.

The following assessment was made on 1 February 1996:

Culpability component	25% x \$200*	\$50.00
Hindrance component	Not applicable	\$00.00
Penalty calculated	Sum of above	\$50.00
Voluntary disclosure discount	20% x \$50.00	(\$10.00)
PENALTY		\$40.00

Note * : Amount of SG charge avoided of \$200 is the sum of \$150 shortfall understated plus \$50 interest component understated.

Denise will have to pay the \$200 additional shortfall and interest, the \$40.00 penalty, plus a late payment penalty to the ATO. As the assessment was for the first year of operation, the auditor may consider it appropriate to remit the penalty further.

Example 2 (Carelessness, lack of reasonable co-operation and partial disclosure)

On 14 August 1995, Adrienne lodged and paid the full charge owing on the SG statement for the 1994-95 year.

On 1 March 1997, the ATO advised Adrienne that her 1994-95 arrangements were going to be investigated.

During the audit, Adrienne disclosed in writing that she had not included a shortfall of \$500 relating to a casual employee in the statement.

During the audit, Adrienne also disclosed a letter issued in July 1995 from the ATO correctly advising her to make contributions or pay the charge on behalf of a contractor - she did neither. In addition, she did not provide information relating to the contractor in a timely fashion

during the audit when requested. The shortfall relating to the contractor totalled \$1000.

The auditor took the following factors into account when calculating the penalty:

- A Part 7 penalty for making a false or misleading statement is applicable;
- Adrienne had been careless in omitting the shortfall relating to the casual employee. However, because the auditor had not begun enquiring into the shortfall relating to the casual employee, Adrienne's disclosure saved significant time and resources in the audit; and
- Although Adrienne hindered the audit process in relation to one transaction, she was co-operative in other matters. For this reason, the auditor exercised his discretion and reduced the 20% hindrance component to 15%.

The following assessment was made on 30 September 1997:

Culpability component	25% x \$1500*	\$375.00
Hindrance component	15% x \$1500	\$225.00
Penalty calculated	Sum of above	\$600.00
Voluntary disclosure discount relating to the casual employee	20% x (<u>500</u> x \$600.00) 1500	(\$40.00)
PENALTY		\$560.00

Note * : Amount of SG charge avoided of \$1500 is the sum of \$500 understated shortfall relating to the casual employee plus \$1000 shortfall relating to the contractor.

Adrienne will have to pay a Part 7 penalty of \$560.00 in addition to the \$1500 additional shortfall, the interest and administration components, plus a late payment penalty to the ATO.

Example 3 (Recurring offence, carelessness)

Bruce was audited in 1997. The auditor discovered that he had not made any superannuation contributions nor lodged a statement for the 1993-94, 1994-95 and 1995-96 years.

The audit showed that the charge would have been \$1000 for 1993-94, \$1200 for 1994-95, and \$1500 for 1995-96.

Therefore, Bruce is liable to pay Part 7 penalties for failing to lodge SG statements for the three years in question.

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The auditor was of the opinion that Bruce was careless in neglecting his obligations under the SGAA, and made the following assessment on 14 August 1997:

1993-94 income year

Culpability component	25% x \$1000	\$250.00
Hindrance component	Not applicable	
Recurring offence component	Not applicable	
Non-lodger component	10% x \$1000	\$100.00
Penalty calculated	Sum of above	\$350.00
Voluntary disclosure discount	Not applicable	
PENALTY		\$350.00

1994-95 income year

Culpability component	25% x \$1200	\$300.00
Hindrance component	Not applicable	
Recurring offence component	5% x \$1200	\$60.00
Non-lodger component	10% x \$1200	\$120.00
Penalty calculated	Sum of above	\$480.00
Voluntary disclosure discount	Not applicable	
PENALTY		\$480.00

1995-96 income year

Culpability component	25% x \$1500	\$375.00
Hindrance component	Not applicable	
Recurring offence component	10% x \$1500	\$150.00
Non-lodger component	10% x \$1500	\$150.00
Penalty calculated	Sum of above	\$675.00
Voluntary disclosure discount	Not applicable	
PENALTY		\$675.00

In addition to the SG shortfalls and late payment penalties for the three years, 1993-94, 1994-95 and 1995-96, Bruce will have to pay Part 7 penalties of \$350.00, \$480.00 and \$675.00 respectively.

Date of effect

42. This Ruling 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 that the legislation commenced to operate (1 July 1992).

Commissioner of Taxation

11 August 1994

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- SGAA 62
- SGAA Part 7
- Taxation (Interest on Overpayments
Act) 1983 10