TR 97/8 - Income tax: RPS, PAYE and PPS remission of penalty for failure to deduct tax

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This document has changed over time. This is a consolidated version of the ruling which was published on *9 July 1997*

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

other Rulings on this topic

IT 2246

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*This Ruling, to the extent that it is capable of being a 'public ruling' in terms of Part IVAAA of the **Taxation Administration Act 1953**, is a public ruling for the purposes of that Part. Taxation Ruling TR 92/1 explains when a Ruling is a public ruling and how it is binding on the Commissioner.*

[Note: This is a consolidated version of this document. Refer to the Tax Office Legal Database (http://law.ato.gov.au) to check its currency and to view the details of all changes.]

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. The principal obligations are the responsibilities to deduct tax from the payments 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 statutory penalties for failing to deduct amounts as required by the law and sets out guidelines for the remission of the amount of penalty imposed. It applies to all payers, whether they are required to remit tax on a quarterly, monthly or bimonthly basis or whether they are required to deduct tax on a regular or irregular basis.

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), Regulations under the Act and incorporates the *Taxation Administration Act 1953* (TAA); and

- references to sections and subsections relate to the Act unless otherwise specified.

Date of effect

4. This Ruling applies to all decisions involving the exercise of a discretion to remit penalty for failure to deduct tax made on or after the date of issue of the Ruling. It does not apply to **payers** 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 may 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 or a reportable 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 in the accounts or books of the payer. Failure to pay this deduction to the Commissioner is a 'failure to pay' (or 'failure to send') offence. Australian Taxation Office (ATO) policy on offences of this type will be discussed in a separate Ruling.

7. Failure to deduct at the prescribed rate or to pay deductions to the Commissioner may result in prosecution (see the Commissioner's prosecution guidelines set out in Taxation Ruling IT 2246) and court imposed penalties. Alternatively, penalties may be imposed directly by the Act. Penalties imposed by the Act are often referred to as '**statutory penalties**'.

Comment [A1]: Page: 2

8. The provisions dealing with penalties recognise there are circumstances where it is fair that the penalty imposed by the Act be remitted in whole or in part. The Act, therefore, gives the Commissioner a discretion to remit penalties.

9. The ATO is required to collect taxation revenues properly payable, and a major strategy in performing this role is to encourage payers to comply voluntarily with the Act. When penalties for a 'failure to deduct' offence are considered for remission, regard is given to the payer's past compliance behaviour and to indicators of future compliance behaviour.

10. The Commissioner encourages payers to seek guidance, either from the ATO or from qualified taxation practitioners, in determining the correct treatment of payments. Payers who exercise **reasonable care**, but make an honest mistake in fulfilling their obligations are treated leniently when remission of penalties is being considered. Conversely, payers who exercise less than reasonable care or who intentionally disregard their obligations under the law receive less favourable treatment when the extent of remission of penalties is being considered.

Changes to previous guidelines

11. This Ruling changes the guidelines set out in Taxation Rulings IT 2172, IT 2210 and IT 2211. Those Rulings are now withdrawn.

12. The main features of the guidelines are now as follows:

- **voluntary disclosures** are rewarded through reduced rates of **culpability penalty**;
- to increase consistency, specific rates of culpability penalty are suggested for typical categories of behaviour, but may be varied to allow for mitigating or aggravating factors;
- the scale of typical culpability 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 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 an offence has been detected.

Discretion of ATO officers

13. Any exercise of a legislative discretion, including a discretion to remit penalties, must take account of the facts of each particular case. At all times, the guidelines in this Ruling should be administered in a commonsense manner.

14. Officers should consider all relevant factors, should not consider irrelevant factors, and should determine the most appropriate amount of remission for the particular circumstances. Officers should ensure they record:

- the relevant findings of fact that they took into account in their decision;
- the evidence on which these findings are based; and
- the reasons for the decision.

15. In examining cases where an offence may have occurred, officers should be flexible in determining the appropriate period of examination. The period of examination should be that period which the officer believes represents the best balance between the need to ensure a payer is complying with RPS, PAYE or PPS obligations, and the cost, both to the ATO and the payer, of these examinations.

16. Examinations should be extended only where it is reasonable to do so. For example, officers may extend the period of examination where:

- substantial undeducted or under-deducted amounts have been detected; or
- the officer considers there is a reasonable likelihood that the payments made may not be disclosed as assessable income by the **payee**, e.g., payments made 'cash in hand' or where a payee quotes an incorrect tax file number.

Where the period of examination has been extended, the time frame set should result in a penalty amount that is both correct and capable of deterring a payer from committing further breaches.

Failure to deduct by non-government bodies

Penalty provisions

17. A payer that is not a **government body** is liable to a penalty if the payer makes a reportable payment, pays salary or wages, or makes a prescribed payment without first making a deduction as required under sections 220AF (RPS), 221C (PAYE), 221YHD or 221YHDA (PPS). These statutory penalties are automatically imposed by the operation of sections 220AS (RPS), 221EAA (PAYE) or 221YHH (PPS).

Components of penalty

18. There are two components of the penalty referred to above. The first is a flat amount equal to the amount of tax the payer failed to deduct. This amount is referred to in the income tax law as the 'undeducted amount', 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 of the culpability amount. This is referred to as **per annum penalty**. It continues to accrue on any part of the culpability penalty that remains unpaid.

Calculation of the total penalty payable

19. The total penalty payable is the sum of the culpability penalty amount and the per annum penalty amount. The formula for calculating this can be expressed as follows:

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

where:

C is the culpability penalty amount for any particular period;

N is the number of days, computed from the date when the payment should have been made to the Commissioner until the date of payment of the culpability penalty; and

Y is the number of days in the financial year.

See **Examples** at paragraphs 59 to 81 for calculations.

Remission of culpability penalty

20. Culpability penalty is imposed on payers for failure to comply with the law. It reflects the level of accountability to be assigned to the payer for non-compliance.

21. The Act applies a culpability penalty equal to 100% of the amount not deducted. However, the Commissioner has a discretion to remit the whole or any part of this penalty under subsections 220AU(2) (RPS), 221N(2) (PAYE) or 221YHL(2) (PPS). Paragraphs 22 to 25 set out concessional treatment applied to voluntary disclosures. Paragraphs 26 to 33 set out further reduced rates for culpability penalties that may be expected in typical cases as well as explaining factors warranting a departure from that standard (whether further decreasing or increasing penalty from the standard). The culpability penalty rate consists 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. Before considering those circumstances, a decision should be made as to whether the payer has voluntarily disclosed the failure to deduct or the under-deduction.

Voluntary disclosure

22. Persons who voluntarily disclose their non-compliance may generally expect to receive concessional treatment when the level of

remission of culpability penalty is being considered. The concession given is to reduce the statutory culpability penalty (100% of the amount not deducted) 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 (to avoid disputes about the timing and extent of the disclosure);
- contain all relevant material facts; and
- not be made as a result of any ATO activity relating to the payer's RPS, PAYE or PPS liability.

23. 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.

24. 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 may still qualify for a reduced penalty on that part of the shortfall. The remainder of the shortfall will not attract the concessional treatment associated with a voluntary disclosure.

25. If a disclosure is made as a result of ATO activity relating to the payer's RPS, PAYE or PPS activities, then that disclosure will be treated as **positive co-operation**.

Typical culpability rates

26. Persons who fail to deduct or who under-deduct ordinarily have the culpability penalty (including the concessional culpability penalty amount determined following a voluntary disclosure) reduced, depending on their level of accountability. Typically, the culpability penalty rate is reduced to the percentages in the table below:

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

As indicated previously, where a voluntary disclosure has been made the typical culpability rate is applied to the concessional amount of culpability penalty (i.e., the rate is applied to an amount being 20% of the amount not deducted: see paragraph 22).

27. It should be noted that:

- in the event of multiple offences for failure to deduct, each offence 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

28. The Commissioner expects ATO officers to receive **reasonable co-operation** from payers and their representatives in the performance of their duties. Co-operation above or below this level during examinations may result in a variation to the typical culpability rate. The examples outlined below illustrate how the typical culpability rate may be varied.

29. Mitigating circumstances reduce the typical rate by a factor of up to 25%, and may include the following:

- greater than reasonable co-operation during the examination 10%
- positive co-operation 25%.

30. Aggravating circumstances increase the typical culpability rate by a factor of up to 25%, and may include the following:

- lack of reasonable co-operation causing delay of the examination 10%
- deliberate false or misleading statement 25%.

31. Only one of these 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 is applied.

Repeat offence

32. Where a payer has been penalised for a failure to deduct offence within 36 months before the **penalty decision** relating to the offence under consideration, the offence may warrant an increase in the culpability rate otherwise determined by the application of paragraphs 22 to 31. Such an increase applies where the current offence is considered by the Commissioner to be similar in nature to the previous offence, e.g., failure to deduct from allowances paid to employees. Conversely, failure to deduct from a prescribed payment is not considered to be similar to failure to deduct from a salary or wage payment.

33. A repeat offence attracts a 33.3% increase in the culpability rate.

Remission of per annum penalty

34. Per annum penalty is imposed by the Act to partly compensate the Commonwealth for the non-availability of monies resulting from a payer's failure to deduct the appropriate amount of tax.

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

- the failure to deduct was NOT caused directly or indirectly by an act or omission of the payer, and the payer 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 the payer 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.

36. The first two tests for remission indicate that it is necessary for the payer to have taken reasonable steps to correct the circumstances that led to the failure to deduct tax and that it is unlikely that such offences will recur. Where the payer has not taken such steps, there is no basis for remission of the per annum penalty, unless there are special circumstances. Factors which may help officers in determining remissions under the first two tests are:

- the period over which the failures to deduct continued;
- whether the payer has taken action to ensure that the circumstances that contributed to the failure to deduct are unlikely to recur; and
- the speed with which the payer identified and corrected the breach(es).

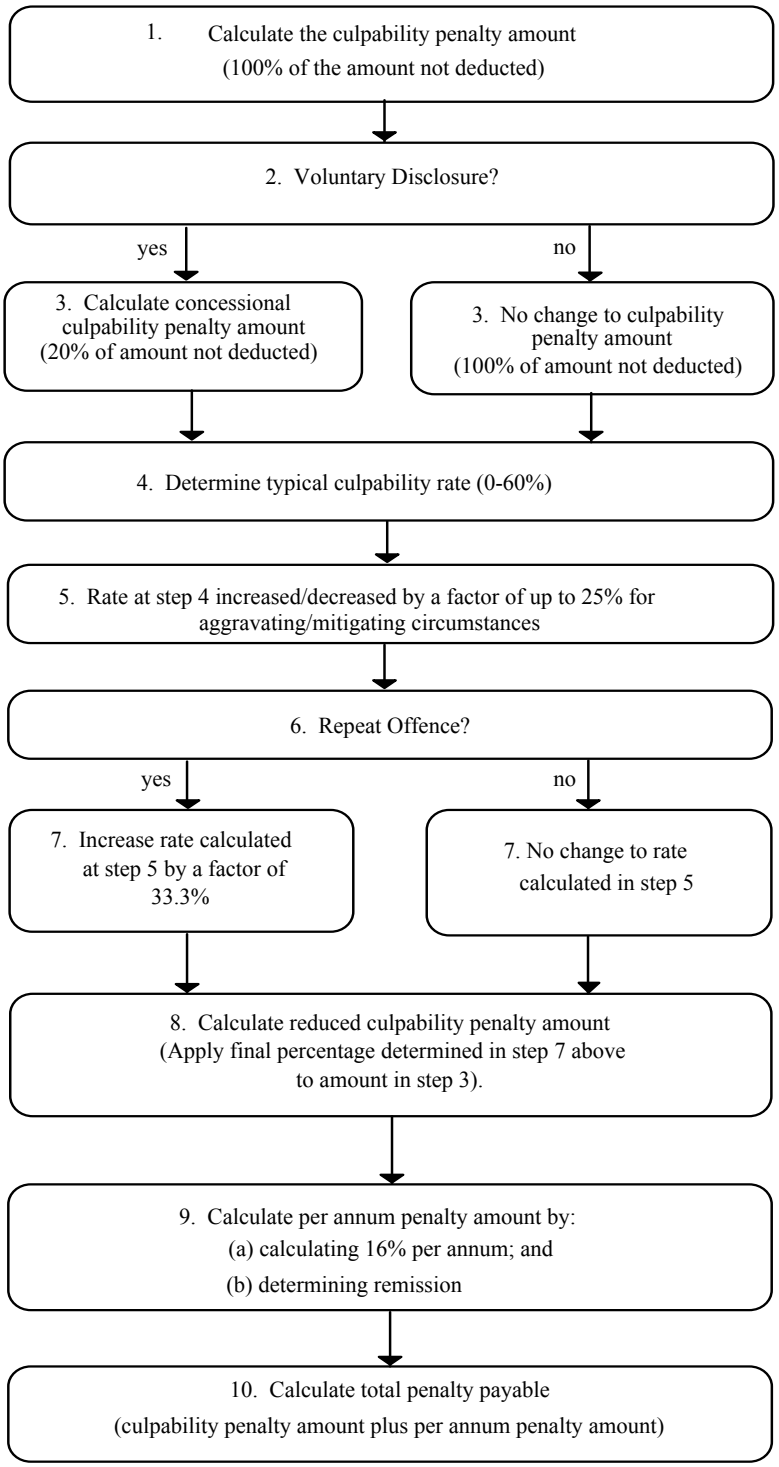
37. Where a 'special circumstances' remission is sought, officers may consider circumstances such as flood, fire or other natural disaster or serious ill health. Care must be taken by officers to ensure the circumstances relied on prevented the payer from making deductions. In other words, the circumstance (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.

38. Unless one of the tests outlined in paragraph 35 is satisfied, the per annum component of the statutory penalty will not be remitted below the rate of 16% per annum.

Decision chart

39. The following chart illustrates the decision making process to be followed to determine the amount to which the statutory penalty may be remitted.


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%)
5. Rate at step 4 increased/decreased by a factor of up to 25% for aggravating/mitigating circumstances
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 step 7 above to amount in step 3).
9. Calculate per annum penalty amount by:
(a) calculating 16% per annum; and
(b) determining remission
10. Calculate total penalty payable
(culpability penalty amount plus per annum penalty amount)

Failure to deduct by government bodies

40. The obligations of a government body to deduct tax are the same as those of a non-government body (refer paragraph 17), but the penalty provisions vary, as set out below. Factors influencing remission of penalty where government bodies are concerned do not differ in principle from cases involving other payers.

Penalty provisions

41. No provision exists in the Act to allow culpability penalties to be imposed on a government body for failure to deduct tax. Similarly, no provision exists in the Act to allow per annum penalties to be imposed on the Commonwealth. However, the Act imposes per annum penalties on payers who are State or Territory governments or authorities of the Commonwealth, a State or a Territory.

42. 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 for the period commencing on the day on which the payer should have paid the amount of the deduction to the Commissioner ('the **due date**') and ending on the day the whole of the per annum penalty payment is made ('the **penalty payment date**').

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

Calculation of penalty amount

44. This penalty is calculated at 16% per annum of the amount the payer failed to deduct and accrues daily. The formula for calculating the penalty is as follows:

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

where:

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

N is number of days measured from the 'due date' to the 'penalty payment date' (in the case of PPS), or from the 'deduction date' to 30 June in the financial year in which the failure to deduct tax occurred (in the case of PAYE and RPS); and

Y is the number of days in the financial year.

Remission of penalty amount

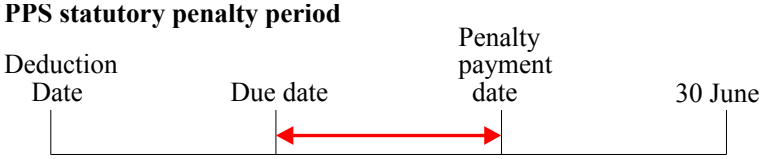
45. In appropriate circumstances, the Commissioner is able to remit the whole or any part of the penalty under subsections 220AU(2) (RPS), 221N(2) (PAYE) or 221YHL(2) (PPS).

46. Because the penalty applicable to government bodies is similar in nature to the per annum penalty component imposed on non-government bodies, remissions to take account of individual circumstances are generally determined using the guidelines for 'remission of per annum penalty for non-government bodies' (refer paragraphs 34 to 38). See **Examples** at paragraphs 59 to 81 for calculations.

47. However, these penalty provisions are not consistent. In order to achieve consistency across the collection systems, the Commissioner applies a general remission so that the same period is used to calculate the per annum penalty irrespective of the collection system involved.

48. The result is that, where the 'penalty payment date' is in the SAME financial year as the 'deduction date', penalties for government bodies are imposed only in respect of the period between the 'due date' and the 'penalty payment date'.

PPS statutory penalty period



Penalty period after general remission (no change)



PAYE & RPS statutory penalty period



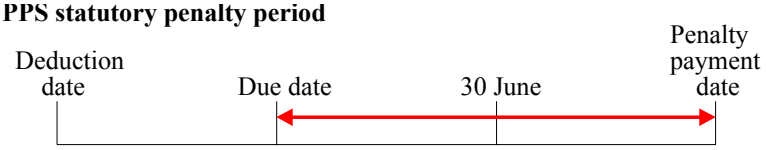
Penalty period after general remission



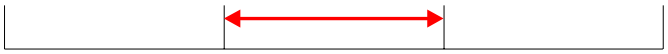
49. Where the 'penalty payment date' is in the financial year FOLLOWING that when the deduction should have been made, penalties

for government bodies are imposed only in respect of the period between the 'due date' and the 30 June of that same financial year.

PPS statutory penalty period



Penalty period after general remission



PAYE & RPS statutory penalty period



Penalty period after general remission



Financial hardship

50. Where the amount of penalty determined according to these guidelines would cause genuine financial hardship for the payer, a further remission may be warranted. Generally, where a penalty amount results in financial hardship, the Commissioner considers a further reduction of the culpability component only. The extent of any reduction depends on the facts in each case.

51. The Commissioner does NOT consider a payer to be suffering financial hardship if unable to pay penalties due to temporary cash flow problems caused by circumstances such as:

- a loss of custom or clientele; or
- abnormal business related expenses or asset purchases.

52. Financial hardship may be demonstrated by:

- the INABILITY to borrow funds to pay outstanding penalties;
- the commencement of liquidation proceedings;
- the effect the penalty amount has on the capacity of the business to continue to trade; or
- the necessity to sell **reasonable possessions** in order to pay the penalty amount.

Review of decisions relating to penalty

53. Under subsections 220AU(4) (RPS), 221N(3) (PAYE) or 221YHL(3) (PPS), the Commissioner must give written notice of a decision not to remit, or to remit only part of, the culpability penalty. Payers that are non-government bodies have a right to object against the Commissioner's remission decision on culpability penalty (RPS, PAYE and PPS), or on per annum penalty (RPS only). These rights arise under sections 220AZH (RPS), subsection 221N(4) (PAYE) or paragraph 221YHT(2)(a)(PPS).

54. There is no provision for objection against PAYE or PPS per annum 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 failure to deduct the tax and the basis on which remission is sought.

Objections and appeals

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

56. 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 with the AAT or the Federal Court as appropriate.

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

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

Examples

59. The following are intended as a guide only.

60. 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.

61. As explained in paragraph 41, the law does not provide for a culpability penalty for government bodies, although they may be subject to per annum penalty.

Example 1

- **Non-voluntary disclosure**
- **Reasonable care**
  - **honest mistake**
  - **minor carelessness**
  - **insignificant amount**
- **Reasonable cooperation**.

Facts

62. During an examination, an ATO officer discovered the employer had been using superseded tax scales. As a result, the employer had under-deducted small amounts from some payments over a period of several months. The employer had consulted with its accountant when it completed its annual group tax reconciliation and, when advised of the error, the employer had corrected it by deducting at the correct rate from all subsequent payments.

Decision

63. The employer has acted with reasonable care in complying with its obligations and provided reasonable co-operation to the ATO officer.

64. Factors considered when determining the penalty were:

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

Penalty calculation

65. Culpability penalty is calculated as:

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

Example 2

- **Voluntary disclosure**
- **Lack of reasonable care**.

Facts

66. The employer has failed to deduct tax instalments of $10,000 from payments to casual employees. 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 before the notification of any examination, the employer disclosed to the ATO that she was unsure of the status of the casual employees.

Decision

67. The employer has acted with a 'lack of reasonable care'.

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

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

- 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.

Penalty calculation

70.

Statutory penalty amount (100% of amount not deducted)	=	$10,000
80% remission for voluntary disclosure	=	$8,000
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.

Per annum penalty (PAP) continues to be calculated at 16% since no grounds arose for the remission of this component of the penalty.

Per annum component is calculated using the formula:

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

where:

C is the culpability penalty amount for the period (in this example, $300);

N is the number of days computed from the date when the payment should have been made to the Commissioner until the date of payment of the culpability penalty (in this example, 200 days); and

Y is the number of days in the financial year.

Therefore:

PAP	=	[($300 x 16%) x (200/365)]
	=	$26.30
Penalty payable	=	Culpability penalty amount + PAP
	=	$300 + $26.30
	=	$326.30.

Example 3

- **Non-voluntary disclosure**
- **Recklessness**
- **Aggravating circumstances**.

Facts

71. During an examination it was discovered that the employer had failed to deduct tax instalments of $10,000 from site allowance payments. The employer made no attempt to contact his accountant or the ATO to ascertain the correct treatment of these payments. The employer delayed the examination by stating the records were with the accountant and later admitted that the records were always in his possession. The employer also stated during the examination that he understood many of the allowances paid in his industry are subject to tax instalment deductions but, to create the impression that he was

paying over the award, he decided not to deduct tax from any allowances.

Decision

72. The employer has been reckless in complying with his obligations and deliberately obstructed the ATO officer in the conduct of the examination. There was no voluntary disclosure of the failure to deduct tax.

73. Facts considered when determining the typical culpability rate were:

- 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.

74. The aggravating circumstance is the deliberate false statement made to the ATO officer about the location of the records.

Penalty calculation

75. 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) [25% of 30%] = 7.5%

culpability penalty rate [30% + 7.5%] = 37.5%

culpability penalty amount = $10,000 x 37.5%

= $3,750.

Per annum penalty (PAP) continues to be calculated at 16% since no grounds arose for the remission of this component of the penalty.

Per annum component is calculated using the formula:

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

where:

C is the culpability penalty amount for the period (in this example $3,750);

N is the number of days, computed from the date when the payment should have been made to the Commissioner until the date of payment of the culpability penalty (in this example 200 days); and

Y is the number of days in the financial year.

Therefore:

PAP = [($3,750 x 16%) x (200/365)]

= $328.76

Penalty payable = culpability penalty amount + PAP

= $3,750 + $328.76

= $4,078.76.

Example 4

- **Non-voluntary disclosure**
- **Intentional disregard**
- **Aggravating circumstances**
- **Repeat offence**.

Facts

76. The employer had 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 between themselves that there would be no deductions made and payments were disguised to make detection of the arrangement difficult. The employer had been previously penalised for failing to deduct tax from payments to his workers following an examination conducted 15 months ago.

Decision

77. The employer has intentionally disregarded the advice of the Commissioner. The employer made false statements to the ATO officer and disguised the nature of the payments. There was no voluntary disclosure of the failure to deduct tax and a repeat offence warrants an increase in the culpability rate.

78. Factors considered in determining the typical culpability rate were:

- 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
- the employer had been advised previously of the obligation to deduct tax.

79. Aggravating circumstances are:

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

80. Repeat offence factors are:

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

Penalty calculation

81. 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) (25% of 60%) = 15%
repeat offences component (33.3% of (60 + 15%)) = 25%
culpability penalty rate (60% + 15% + 25%) = 100%
(this is the maximum rate that the Act permits)
culpability penalty amount = $10,000 x 100%
= $10,000.

Per annum penalty (PAP) continues to be calculated at 16% since no grounds arose for the remission of this component of the penalty.

Per annum component is calculated using the formula:

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

where:

C is the culpability penalty amount for the period (in this example, $10,000);

N is the number of days, computed from the date when the payment should have been made to the Commissioner until the date of payment of the culpability penalty,(in this example 200 days); and

Y is the number of days in the financial year.

Therefore:

PAP = [($10,000 x 16%) x (200/365)]

= $876.71

Penalty payable = culpability penalty amount + PAP

= $10,000 + $876.71

= $10,876.71.

Glossary

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

Authorised representative

83. 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

84. 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.

Deduction date

85. The deduction date is the day on which the payer should have made the deduction.

Due date

86. The due date is the day on which the payer should have paid the amount of the deduction (had it been made as required) to the Commissioner.

Government body

87. 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

88. 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.

Payee(s)

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

Payer(s)

90. 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.

Penalty decision

91. A penalty decision relating to an offence or a series of offences for failure to deduct occurs when an officer later imposes a penalty on the payer. (For a penalty decision to be subject to a 'repeat offence' component it must relate to a similar offence within the same tax collection system as a penalty decision made within the previous 36 months).

Penalty payment date

92. The penalty payment date is the day the whole of the per annum penalty payment is made.

Per annum penalty

93. The amount calculated to partly compensate the Commonwealth for the non-availability of monies properly payable to it. This penalty is also applied to encourage payers to pay promptly any culpability penalty amount imposed.

Period of examination

94. 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

95. Positive co-operation occurs when a payer voluntarily and fully discloses non-compliance after being informed by the Commissioner that an examination has commenced or will commence (see also 'Reasonable co-operation' at paragraph 99).

Reasonable care

96. Reasonable care requires that a payer exercises the care that a reasonable, ordinary payer would exercise to fulfil that payer's tax obligations. This would normally include a payer ascertaining before they are made whether payments are liable to deduction.

97. A payer exercising reasonable care may still make an honest mistake based on reasonable grounds. This may include occasions where a payer:

- holds an honest but incorrect belief based on reasonable grounds that an obligation to deduct has not arisen; and
- upon discovering the error takes immediate steps to rectify the failure to deduct and avoid a recurrence.

By its nature, an honest mistake may at times involve a large or a small non-deduction or under-deduction.

98. 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

99. In general terms, reasonable co-operation requires a payer to provide relevant and reasonable information, whether orally or in writing, truthfully and to the best of his or her ability; and to provide in a timely manner books and records having regard to the particular payer's circumstances. A payer is 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 (see also 'Positive co-operation' at paragraph 95).

100. Factors indicating less than reasonable co-operation include:

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

101. Factors indicating greater than reasonable co-operation 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.

Reasonable possessions

102. Reasonable possessions are assets of a modest value which would not be expected to be sold to pay outstanding penalties, and may include:

- ownership of or equity in the family home;
- a motor vehicle;
- furniture or household goods; and
- tools of trade.

Holiday homes, investment properties, shares, boats or luxury motor vehicles, are NOT considered by the Commissioner to be reasonable possessions.

Recklessness

103. Recklessness may occur when a payer acts with utter carelessness showing disregard of, or indifference to, his or her obligations. It is a state of mind stopping short of deliberate intention and going beyond mere inadvertence or carelessness.

104. This could occur, for example, where the payer does not take steps to clarify the correct treatment of a payment despite having reasonable grounds to believe a liability to deduct may exist.

Repeat offence

105. 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 is treated as involving a single offence. The offence should be similar in nature to the previous offence and relate to the same tax collection system as the previous offence.

Statutory penalty

106. The statutory penalty is the rate of penalty applied by the law before any remissions are granted by the Commissioner.

Under-deduct

107. 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

108. A disclosure is generally treated as having been made voluntarily if it is made by that payer before the start of ATO activity relating to an RPS, PAYE, or PPS liability.

Previous Rulings

109. Taxation Rulings IT 2172, IT 2210 and IT 2211 are now withdrawn.

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