

PS LA 2007/1 (GA) - Assessing superannuation guarantee charge where the employers have done what they could reasonably be expected to do to comply with the law by the due date

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Practice Statement Law Administration (General Administration)

PS LA 2007/1 (GA)

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FOI status: may be released

This practice statement is issued under the authority of the Commissioner and must be read in conjunction with Law Administration Practice Statement PS LA 1998/1. It must be followed by ATO staff unless doing so creates unintended consequences or is considered incorrect. Where this occurs ATO staff must follow their business line's escalation process.

SUBJECT: Assessing superannuation guarantee charge where the employers have done what they could reasonably be expected to do to comply with the law by the due date

PURPOSE: To outline some situations in which it may not be necessary to assess an employer for the superannuation guarantee charge if there is evidence that an employer has done what they could reasonably be expected to have done to comply with the law by the due date

STATEMENT

1. This practice statement outlines circumstances where officers may decide, for administrative reasons, to not raise an assessment of superannuation guarantee charge against an employer or to allow an employer's objection to a superannuation guarantee charge assessment. This may be so where, although the trustee of a complying superannuation fund or retirement savings account (RSA) has not received a contribution by the due date, it is clear the employer took all reasonable steps to comply with their obligations by the due date.
2. Situations where employers have done what they could reasonably be expected to do to comply with the law by the due date include the following:
 - the employer has posted a cheque to a complying superannuation fund or RSA within 28 days after the end of the quarter to meet the employer's superannuation guarantee obligations
 - the employer has, within 28 days of the end of the quarter, sent a payment to a superannuation fund or RSA that the employer reasonably believed held an active account in the name of the employee, or

- the employer provided a clearing house, that is not an agent of the employer, with funds to meet the employer's superannuation guarantee obligations before 28 days after the end of the quarter but the clearing house failed to make contributions to the employees' respective superannuation funds and RSAs by that date.
3. Officers may, having regard to the principles and examples set out below, decide to not raise a superannuation guarantee charge assessment against a particular employer. However, officers must be satisfied the facts establish that the employer has taken reasonable steps to fulfil their obligations under the law.
 4. This practice statement does not apply to situations where an employer is liable for the superannuation guarantee charge because the employer's contributions are made late due to an act or omission of the employer's agent.

Contribution posted within 28 days of the end of the quarter

5. It may be evident to an officer that a contribution (in the form of a cheque), received by a superannuation fund or RSA after the due date for contributions, was posted by the employer before the due date.¹
6. An assessment of superannuation guarantee charge need not be raised provided that an officer is satisfied that:
 - it is clear from the employer's business practices that the cheque was posted before the due date
 - the employer's business practices allow enough time for the cheque to arrive by mail, by the due date²
 - the cheque was not post-dated or backdated, and
 - the cheque was honoured on presentation.

Payment sent to a superannuation fund or RSA reasonably understood to hold an active account in the name of the employee

7. An employer may attempt to contribute to a superannuation fund where the employee is no longer a member, or to an RSA no longer held by an employee. In these circumstances the superannuation fund or the RSA provider will return the payment to the employer. However, the payment may not be returned until after the due date for contributions has passed.
8. An assessment of superannuation guarantee charge need not be raised provided that an officer is satisfied that:
 - the employer sent the payment within sufficient time for the trustee of the superannuation fund or RSA to receive the payment within 28 days of the end of the quarter

¹ Australia Post Delivery times can be obtained from Letter Post Guide available on Australia Post website at www.auspost.com.au.

² Australia Post Delivery times can be obtained from Letter Post Guide available on Australia Post website at www.auspost.com.au.

- the employer tried to contribute to the last known superannuation fund or RSA belonging to the employee
- the employer could not reasonably have been expected to know that the employee's benefits were no longer held in that superannuation fund or RSA, and
- the employer takes reasonable steps to identify a current superannuation fund or RSA for the employee and makes an appropriate contribution to it as soon as practicable. (Note: Before 1 July 2006 the employer may have contributed the amount to the Superannuation Holding Account (SHA) special account.)

The employer allowed a clearing house reasonable time to make contributions

9. An employer may engage a clearing house to make contributions to superannuation funds on their behalf. A clearing house is a service provided by an organisation (which may be a superannuation fund) that accepts payments from an employer. The clearing house, on behalf of the employer, then distributes contributions to the particular superannuation funds chosen by the employees. The employer generally pays the clearing house a fee to use the service.
10. Typically, the contract between an employer and a clearing house will set out the terms and conditions of the agreement between the clearing house and the employer and may include the maximum time it takes for a clearing house to process payments. Circumstances may arise in which a clearing house fails to make a contribution by the due date on behalf of an employer to an employee's superannuation fund.
11. An assessment of superannuation guarantee charge need not be raised provided that an officer is satisfied that:
 - the clearing house is not an agent of the employer
 - having regard to the terms and conditions (including service standards) of any agreement with the clearing house the employer has allowed sufficient time for a clearing house to process their payments to meet the superannuation guarantee due date, and
 - the failure to make the contribution on time was in no way attributable to any act or omission on the employer's part (for example, the clearing house was provided with or was able to access sufficient funds to make the contribution).

Act or omission of an agent

12. An assessment of superannuation guarantee charge must be made where the contribution is late because of the acts or omissions of an employer's agent.

Amendments and objections

13. The principles outlined in the above situations may be applied by a tax officer in deciding to allow an employer's objection to a superannuation guarantee charge assessment. This might apply to any case where:
- the assessment of superannuation guarantee charge was raised prior to the release of this practice statement, or
 - the employer presents evidence, that was not available at the time of audit, to support an objection to an assessment resulting from that audit.

EXPLANATION

14. The *Superannuation Guarantee (Administration) Act 1992* (SGAA) provides that an employer is required to make contributions to a complying superannuation fund or RSA for their employees, in accordance with minimum prescribed levels, to avoid paying the superannuation guarantee charge.
15. Section 16 of the SGAA imposes superannuation guarantee charge on an employer who has a superannuation guarantee shortfall for a quarter. Sections 22 and 23 of the SGAA state that where an employer makes contributions to a complying superannuation fund or RSA for the relevant quarter, the superannuation guarantee shortfall is reduced. A contribution will only reduce an employer's superannuation guarantee shortfall if made during the quarter or within 28 days of the end of the quarter.
16. A superannuation guarantee shortfall will exist where a contribution is made late even if the employer makes every reasonable effort to comply with the law.
17. However, no superannuation guarantee charge is payable until either:
- the employer self-assesses their liability for the charge by lodging a superannuation guarantee statement for a quarter according to section 33 of the SGAA, or
 - the Commissioner assesses an employer's liability for the charge under section 36 of the SGAA.

(In this regard, see the due dates for payment of superannuation guarantee charge set out in section 46 and subsection 36(3) of the SGAA.)

18. Therefore, where an employer has not self-assessed their liability, the Commissioner must take some action to make the employer liable for the charge.
19. Under section 43 of the SGAA the Commissioner has the general administration of the Act. As noted in *Grofam Pty Ltd v. FCT* (1997) 36 ATR 493; 97 ATC 4656, provisions such as section 43 of the SGAA provide the Commissioner with a wide power that includes the power to settle or compromise matters in dispute. Or as Spender J said in *Precision Pools Pty Ltd v. Commissioner of Taxation* (1992) 37 FCR 554; 24 ATR 43; 92 ATC 4549 at 567:

[The Commissioner's] administration has to be bona fide and for the purposes of the Act, but it is a grant of wide power and would encompass, for instance, the power to compromise proceedings in which he was a party or to make agreements or arrangements concerning the efficient management of a dispute in which he was involved.

20. Lord Wilberforce made the following comments in the House of Lords decision of *Vestey v. Inland Revenue Commissioners* [1980] AC 1148 at 1173:
- When Parliament imposes a tax, it is the duty of the Commissioners to assess and levy it upon and from those who are liable by law ...
- Of course [the Commissioner] may, indeed should, act with administrative common sense. To expend a large amount of taxpayers' money in collecting, or attempting to collect, small sums would be an exercise in futility: and no one is going to complain if they bring humanity to bear in hard cases.
21. Similar comments were made in the English case *IRCs v. National Federation of Self Employed & Small Business Ltd* [1982] AC 617. At page 651, Lord Scarman of the House of Lords considered the equivalent administration power of the Inland Revenue Commissioners. He said that:
- ... in the daily discharge of their duties inspectors are constantly required to balance the duty to collect 'every part' of due tax against the duty of good management. This conflict of duties can be resolved only by good managerial decisions, some of which will inevitably mean that not all the tax known to be due will be collected.
22. The comments made in these two English cases have been endorsed by the Courts in Australia. In *Pickering & Ors v. Deputy Commissioner of Taxation* (1997) 37 ATR 41; 97 ATC 4893 at 4900, Cooper J noted that the two English cases had been cited with approval in *David Jones Finance and Investments Pty Ltd & Anor v. FCT* (1997) 37 ATR 41; 90 ATC 4730 at 4733 and on appeal in (1991) 28 FCR 484; (1991) 21 ATR 1506; 91 ATC 4315 at 4318, *Ando Minerals NL v. DFC of T* 94 ATC 4163 at 4164 and *FC of T v. Biga Nominees Pty Ltd* 88 ATC 4270; [1988] VR 1006; (1988) 19 ATR 1037.
23. Having regard to these principles, the Commissioner considers that ATO resources should be directed to those cases where an employer has either failed to provide any superannuation support for their employees or has not made a genuine attempt to comply with their SGAA obligations in a timely way. Where it is clear that an employer has taken reasonable steps to comply with their obligations by the due date but, for reasons beyond the employer's control the contribution is made late, an officer may decide not to assess the superannuation guarantee charge.
24. However, where the contribution is late because of acts or omissions of an employer's agent the superannuation guarantee charge should be assessed. Where an employer (the principal) has authorised an agent to act on the employer's behalf, and the agent is acting within the authority conferred on it by the employer, any act done on behalf of the employer by the agent is an act of the employer. Therefore, an employer must be liable for the superannuation guarantee charge if a failure to comply with the law in a timely way is attributable to an act or omission of the employer's agent.

25. When applying this practice statement, officers must also consider Superannuation Guarantee Determination SGD 2005/2 Superannuation guarantee: is a contribution to a complying superannuation fund or a retirement savings account for the benefit of an employee made when the employer makes the contribution to a clearing house? An employer who makes contributions through a clearing house will have a superannuation guarantee shortfall if the contributions are not made by the due date. However, as outlined in paragraphs 9 to 11 of this practice statement, an officer may decide not to raise an assessment of the superannuation guarantee charge where the clearing house is not an agent of the employer and the circumstances outlined in paragraph 11 apply to the employer.
26. Also, when the employer has made a contribution late, when deciding whether or not to raise an assessment of superannuation guarantee charge, officers must consider the late payment offsetting provisions.
27. The following examples illustrate how this practice statement is to be applied.

Example – Contribution posted within 28 days of the end of the quarter

Example 1

28. An employer whose business is based in Cairns was liable to make superannuation contributions for employees for the quarter ending 30 June. On 25 July, a Thursday, the employer posted a cheque to a fund's office in Sydney. The fund received, and banked, the employer's cheque on Tuesday 30 July. The last day for contributions to be made for the June quarter was Monday 29 July. (because the normal due date for contributions fell on a Sunday). The cheque was honoured on presentation by the fund's bank. The amount contributed satisfied the employer's obligation to provide superannuation support to an appropriate fund for the employees.
29. An assessment of superannuation guarantee charge need not be made in this case. It is clear from the facts that the employees have benefited from appropriate superannuation support. Further, it was reasonable for the employer to allow three business days for the cheque to be received by the superannuation fund.

Examples – Payment sent to a superannuation fund or RSA reasonably understood to hold an active account in the name of the employee

Example 2

30. An employee resigns on 2 May 2006. The employer sends a payment to the fund nominated by the employee on 15 July 2006. On 10 August 2006, the fund returns the amount to the employer advising that the employee is no longer a member of the fund. On 15 August 2006, the employer writes to the employee's address to obtain details of an active fund to which a contribution can be made. The employee responds and the employer makes the new contribution within a week of the response.
31. An assessment of superannuation guarantee charge need not be made in this case. It is clear from the facts that the employee has received superannuation support from the employer as the employer sought to make a contribution on

behalf of the employee within the appropriate timeframe. The employer was unaware of the employee's change of fund and the employer acted reasonably and promptly in seeking to make a new contribution on behalf of the employee.

Example 3

32. An employee has chosen a fund to which the employer must contribute under the choice of fund provisions in Part 3A of the SGAA. The employer's practice is to pay contributions by electronic funds transfer to the relevant fund on the 25th day after the end of each quarter. The transfer of 25 July 2006 for the June 2006 quarter is rejected, as the relevant fund account no longer exists, but the employer's bank fails to advise the employer until 1 August 2006. The employer promptly contacts the employee. The employee advises that the nominated fund has closed or merged with another fund, and provides the employer with the correct fund name and account details for their (new or continuing) chosen fund. The employer promptly makes a contribution to the new account.
33. An assessment of superannuation guarantee charge need not be made in this case. It is clear from the facts that the employee has received superannuation support from the employer. The employer can provide evidence that they sought to make a contribution on behalf of the employee within the appropriate timeframe and as the employer was unaware of the change of fund, the employer could not reasonably be expected to know of the change. The employer acted reasonably and promptly in seeking to make a new contribution on behalf of the employee.

Example 4

34. An employer attempts to pay their June 2006 quarter superannuation guarantee contributions to the SHA special account on 10 July 2006. The SHA special account closed for employer contributions on 30 June 2006. The employer tries to make this payment unaware of the closure of the SHA special account. The ATO returned the cheque to the employer and the employer immediately takes action to identify a superannuation fund or RSA for the employee involved and promptly makes the contribution to the account, albeit a short time after 28 July 2006.
35. An assessment of superannuation guarantee charge need not be made in this case. It is clear from the facts that the employee has received superannuation support from the employer. The employer can provide evidence that they sought to make a contribution on behalf of the employee within the appropriate timeframe and that the employer was unaware of the closure of the SHA special account and payment arrangements for the June 2006 quarter. The employer acted reasonably and promptly in seeking to make a new contribution on behalf of the employee.

Example 5

36. An employee has chosen a fund to which the employer must contribute under the choice of fund provisions in Part 3A of the SGAA. However, the employee provides incorrect fund details on the standard choice form. The employer

attempts to pay their June 2006 quarter superannuation guarantee contributions to the nominated fund on 10 July 2006. On 10 August 2006, the fund returns the amount to the employer advising that it cannot accept the contribution as the employee is not a member of the fund. On 15 August 2006, the employer makes a contribution to the correct fund after obtaining the correct fund details from the employee.

37. An assessment of superannuation guarantee charge need not be made in this case. It is clear from the facts that the employee has received superannuation support from the employer and the employer sought to make a contribution on behalf of the employee within the appropriate timeframe. The employer was unaware that the employee had given incorrect fund details. The employer acted reasonably and promptly in seeking to make a new contribution on behalf of the employee.

Example – The employer allowed a clearing house reasonable time to make the contributions

Example 6

38. An employer engages a clearing house to provide superannuation support for employees. The contract between the employer and the clearing house does not create a principal-agent relationship between the employer and the clearing house. The clearing house is authorised, by a direct debit authority, to transfer the appropriate amounts from the employer's bank account each quarter. The service standards agreed by the employer and clearing house state that the clearing house will make the superannuation contributions within 28 days of the end of the quarter if the necessary funds are available for transfer to the clearing house at the end of the 14th day after the end of the quarter. Due to processing errors at the clearing house, the employer's September 2006 quarter contributions are not made until 3 November 2006. The employer's bank account had sufficient funds to meet the contributions liability on 14 October 2006.
39. An assessment of superannuation guarantee charge need not be made in this case. It is clear from the facts that the employees have received superannuation support from the employer and that the employer has taken reasonable steps to comply with the law by engaging a professional service provider and ensuring sufficient funds were available to that service provider at the time specified in the service standards.

Examples – An agent makes a late contribution on behalf of the employer

Example 7

40. An employer engages a clearing house to provide superannuation support for employees. The contract between the employer and the clearing house creates a principal-agent relationship between the employer and the clearing house. In other respects, the circumstances are the same as Example 6.
41. An assessment of superannuation guarantee charge must be made in this case. As the clearing house is the employer's agent, the acts or omissions of the clearing house are taken to be the employer's.

Example 8

42. An employer asks its tax agent to make superannuation contributions for a particular quarter as the directors of the employer company will be overseas when the contributions are due. However, the tax agent misplaces the cheque. A contribution is eventually made to the relevant fund two and a half months after the due date.
43. An assessment of superannuation guarantee charge must be made in this case. As the tax agent is the employer's agent, the acts and/or omissions of the tax agent are taken to be the employer's.

Amendment history

Date of amendment	Part	Comment
12 May 2010	Various	Minor revisions to update 'Tax Office' to 'ATO' and improve the technical currency of the document.
	References	Deletion of reference to withdrawn PS LA 2006/5.
	Contact details	Updated.
10 August 2009	Various	Minor currency revisions to remove references to withdrawn PS LA 2006/5.
15 April 2009	Contact details	Updated.
11 February 2009	Contact details	Updated.

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Related public rulings	SGD 2005/2
Related practice statements	
Case references	<i>Grofam Pty Ltd v. FCT</i> (1997) 36 ATR 493; 97 ATC 4656 <i>Precision Pools Pty Ltd v. Commissioner of Taxation</i> (1992) 37 FCR 554; 24 ATR 43; 92 ATC 4549 <i>Vestey v. Inland Revenue Commissioners</i> [1980] AC 1148; [1979] 3 All ER 976; [1979] 3 WLR 915 <i>IRCs v. National Federation of Self Employed & Small Business Ltd</i> [1982] AC 617 <i>Pickering & Ors v. Deputy Commissioner of Taxation</i> (1997) 37 ATR 41; 97 ATC 4893 <i>David Jones Finance and Investments Pty Ltd & Anor v. FCT</i> (1997) 37 ATR 41; 90 ATC 4730 <i>Ando Minerals NL v. DFC of T</i> 94 ATC 4163 <i>FC of T v. Biga Nominees Pty Ltd</i> 88 ATC 4270; [1988] VR 1006; (1988) 19 ATR 1037
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