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**

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STATEMENT

Considerations when applying the principles in this practice statement

1. This practice statement outlines circumstances where tax 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 an approved clearing house;[1] 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. 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.
3. The agency created for legislative purposes by subsection 79A(2) of the *Superannuation Guarantee (Administration) Act 1992* (SGAA)[2] is not considered an agency for the purposes of this practice statement.
4. An employer who pays an amount to an approved clearing house[3] for the benefit of an employee, and the payment is accepted by the approved clearing house, is taken to have contributed the same amount to a complying superannuation fund or an RSA for the purposes of sections 23 and 23A,[4] if the contribution was sent by the employer before the due date.
5. 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:

[1] Approved clearing house has the meaning given by subsection 79A(3).
[2] All legislative references in this practice statement are to the SGAA unless otherwise stated.
[3] An approved clearing house is a body specified under regulation 7AE of the Superannuation Guarantee (Administration) Regulations 1994 for the purposes of subsection 79A(3) of the SGAA.
[4] See section 23B.

- the employer sent a payment to a complying superannuation fund; RSA; or an approved clearing house; 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 directly or through an approved clearing house 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.

6. Tax 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, tax officers must be satisfied the facts establish that the employer has taken reasonable steps to fulfil their obligations under the law.

Contribution sent within 28 days of the end of the quarter

7. It may be evident to a tax officer that a contribution (in the form of a cheque or electronic transfer) received[5] by a superannuation fund; RSA, or an approved clearing house, after the due date for contributions, was sent by the employer before the due date.

8. An assessment of superannuation guarantee charge need not be made provided that a tax officer is satisfied that:
   - it is clear from the employer's business practices that the contribution was sent before the due date[6]
   - the employer's business practices allow enough time for the contribution to be received by the due date
   - any cheque was not post-dated or backdated, and
   - the cheque was honoured on presentation.

Payment sent through an approved clearing house or directly to a superannuation fund or RSA reasonably understood to hold an active account in the name of the employee

9. 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; the RSA provider; or the approved clearing house will return the payment to the employer. However, the payment may not be returned until after the due date for contributions has passed.

10. An assessment of superannuation guarantee charge need not be raised provided that a tax officer is satisfied that:

[5] See Taxation Ruling TR 2010/1 Income tax: superannuation contributions.
[6] Australia Post Delivery times can be obtained from Letter Post Guide available on Australia Post website at www.auspost.com.au.

- the employer sent the payment within sufficient time for the approved clearing house; trustee of the superannuation fund or RSA to receive the payment within 28 days of the end of the quarter
- 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 (other than an approved clearing house) reasonable time to make contributions

11. An employer may engage a clearing house to make contributions to superannuation funds on their behalf. This type of 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.

12. 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.

13. 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 (other than an approved clearing house)

14. 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

15. 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

The law and legal principles

16. The 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.

17. The SGAA has been amended by the *Tax Laws Amendment (2010 Measures No. 1) Act 2010* to include the introduction of an approved clearing house. Effective 1 July 2010, an employer who pays an amount to an approved clearing house for the benefit of an employee, and the approved clearing house accepts the payment, is taken to have contributed the amount to a complying superannuation fund or an RSA for the purposes of sections 23 and 23A.[7]

18. Section 16 imposes superannuation guarantee charge on an employer who has a superannuation guarantee shortfall for a quarter. Sections 22 and 23 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.

19. 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.

20. 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, or
    - the Commissioner assesses an employer's liability for the charge under section 36.

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

21. Therefore, where an employer has not self-assessed their liability, the Commissioner must take some action to make the employer liable for the charge.

[7] See section 23B.

22. Under section 43 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 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.

23. 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.

24. 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.

25. 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.

26. 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.

Act or omission of an agent (other than an approved clearing house)

27. 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.

28. When applying this practice statement, tax 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 (other than an approved 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 11 to 12 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 13 apply to the employer.

29. The following examples illustrate how this practice statement is to be applied.

Examples – Contribution sent within 28 days of the end of the quarter

Example 1

30. 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.

31. 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.

Example 2

32. An employer was liable to make superannuation contributions for employees for the quarter ending 31 March. On 26 April, a Tuesday, the employer made an electronic fund transfer to a superannuation fund (RSA, or approved clearing house). The superannuation fund received the amount transferred on 29 April. The last day for contributions to be made for the March quarter was 28 April. The employer was able to show that the amount was transferred from their account on 26 April and that the contributions satisfied the employer's obligation to provide superannuation support to an appropriate fund for the employees.

33. 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 two business days for the funds transferred electronically to be received by the superannuation fund (RSA, or the approved clearing house).

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

Example 3

34. An employee resigns on 2 May. The employer sends a payment either directly to the fund nominated by the employee or to an approved clearing house on 15 July (in the following quarter). On 10 August, the fund or the approved clearing house returns the amount to the employer advising that the employee is no longer a member of the fund. On 15 August 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.

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 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 4

36. An employee has chosen a fund to which the employer must contribute under the choice of fund provisions in Part 3A. 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.

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. 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 5

38. 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.

39. 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 6

40. An employee has chosen a fund to which the employer must contribute under the choice of fund provisions in Part 3A. However, the employee provides incorrect fund details on the standard choice form. The employer attempts to pay their June quarter superannuation guarantee contributions to the nominated fund on 10 July (in the month following). On 10 August 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 the employer makes a contribution to the correct fund after obtaining the correct fund details from the employee.

41. 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 (other than an approved clearing house) reasonable time to make the contributions

Example 7

42. 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.

43. 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 quarter

contributions are not made until 3 November. The employer's bank account had sufficient funds to meet the contributions liability on 14 October.

44. 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 (other than an approved clearing house) makes a late contribution on behalf of the employer

Example 8

45. 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 in Example 7.

46. 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 9

47. 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.

48. 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
1 May 2012	Paragraph 29	Deleted as subject matter not relevant to the object of the document.
27 October 2011	Paragraph 28	SGD 2005/2 was not cited correctly Punctuation
	Paragraph 31	Punctuation
	Paragraph 35	Inserted house between the words “clearing” and “or”
16 September 2010	Various	Updated to include the introduction of the approved clearing house measure.
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.
10 August 2009	Various	Minor currency revisions to remove references to withdrawn PS LA 2006/5.

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Related public rulings	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 (other than an approved clearing house)? TR 2010/1 Income tax: superannuation contributions
Related practice statements	Law Administration Practice Statement PS LA 2006/6 Written guidelines for the reduction of an employer's superannuation guarantee 'choice shortfall'
Case references	*Ando Minerals NL v. DFC of T* 94 ATC 4163 *David Jones Finance and Investments Pty Ltd & Anor v. FCT* (1997) 37 ATR 41; 90 ATC 4730 *FC of T v. Biga Nominees Pty Ltd* 88 ATC 4270; [1988] VR 1006; (1988) 19 ATR 1037 *Grofam Pty Ltd v. FCT* (1997) 36 ATR 493; 97 ATC 4656 *IRCs v. National Federation of Self Employed & Small Business Ltd* [1982] AC 617 *Pickering & Ors v. Deputy Commissioner of Taxation* (1997) 37 ATR 41; 97 ATC 4893 *Precision Pools Pty Ltd v. Commissioner of Taxation* (1992) 37 FCR 554; 24 ATR 43; 92 ATC 4549 *Vestey v. Inland Revenue Commissioners* [1980] AC 1148; [1979] 3 All ER 976; [1979] 3 WLR 915
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