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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PS LA 2007/1 (GA)

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This Practice Statement is an internal ATO document and an instruction to ATO staff.

Taxpayers can rely on this Practice Statement to provide them with protection from interest and penalties in the following way. If a statement turns out to be incorrect and taxpayers underpay their tax as a result, they will not have to pay a penalty, nor will they have to pay interest on the underpayment provided they reasonably relied on this Practice Statement in good faith. However, even if they do not have to pay a penalty or interest, taxpayers will have to pay the correct amount of tax provided the time limits under the law allow it.

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 you may decide, for administrative reasons, to not raise an assessment of superannuation guarantee charge (SGC) against an employer or to allow an employer's objection to an SGC assessment. This may be so where (although an approved clearing house[1]) the trustee of a complying super 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 SGC because the employer's contributions are made late due to an act or omission of the employer's agent, or
   - the most recent stapled super fund as notified to the employer by the Commissioner of Taxation did not accept the employer's contributions.[1A]

3. The agency created for legislative purposes by subsection 79A(2) of the *Superannuation Guarantee (Administration) Act 1992* (SGAA) is not considered an agency for the purposes of this Practice Statement.

3A. All legislative references in this Practice Statement are to the SGAA, unless otherwise indicated.

4. An employer who pays an amount to an approved clearing house[2] 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

[1] Approved clearing house has the meaning given by subsection 79A(3) of the *Superannuation Guarantee (Administration) Act 1992* (SGAA).

[1A] Legislative Instrument SPR 2021/2 *Superannuation Guarantee (Administration) – Stapled Fund – Guidelines for the Reduction of an Employer's Individual Superannuation Guarantee Shortfall for Late Contributions Due to Non-Acceptance by Notified Stapled Fund Determination 2021* provides guidance as to when you may reduce the SGC in this circumstance.

[2] The ATO is an approved clearing house under section 24 of the *Superannuation Guarantee (Administration) Regulations 2018* for the purposes of subsection 79A(3).

super fund or an RSA for the purposes of sections 23 and 23A[3] 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 where the employer:

   - sent a payment to a complying super fund, RSA or an approved clearing house within 28 days after the end of the quarter to meet the employer's superannuation guarantee obligations
   - has, within 28 days of the end of the quarter, sent a payment directly or through an approved clearing house to a super fund or RSA that the employer reasonably believed held an active account in the name of the employee, or
   - 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 super funds and RSAs by that date.

6. You may, having regard to the principles and examples set out in this Practice Statement, decide to not raise an SGC assessment against a particular employer. However, you 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 you that a contribution (in the form of a cheque or electronic transfer) received[4] by a super fund, RSA or an approved clearing house after the due date for contributions was sent by the employer before the due date.

8. An SGC assessment need not be made provided that you are satisfied that:

   - it is clear from the employer's business practices that the contribution was sent before the due date[5]
   - 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 super 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 super fund where the employee is no longer a member or to an RSA no longer held by an employee. In these circumstances, the super 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.

[3] See section 23B.
[4] See Taxation Ruling TR 2010/1 *Income tax: superannuation contributions*.
[5] Australia Post delivery times can be obtained at auspost.com.au.

10. An SGC assessment need not be raised provided that you are satisfied that the employer:

- sent the payment within sufficient time for the approved clearing house, trustee of the super fund or RSA to receive the payment within 28 days of the end of the quarter
- tried to contribute to the last known super fund or RSA belonging to the employee
- could not reasonably have been expected to know that the employee's benefits were no longer held in that super fund or RSA, and
- takes reasonable steps to identify a current super 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 super funds on their behalf. This type of clearing house is a service provided by an organisation (which may be a super fund) that accepts payments from an employer. The clearing house, on behalf of the employer, then distributes contributions to the particular super funds chosen by the employees. The employer generally pays the clearing house a fee to use the service.[6]

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 super fund.

13. An SGC assessment need not be raised provided that you are 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 SGC assessment must be made where the contribution is late because of the acts or omissions of an employer's agent.

[6] See paragraph 32D(ca).

Amendments and objections

15. You may apply the principles outlined in this Practice Statement in deciding to allow an employer's objection to an SGC assessment. This might apply to any case where:

    - the SGC assessment 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 super fund or RSA for their employees, in accordance with minimum prescribed levels, to avoid paying the SGC.

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 super fund or an RSA for the purposes of sections 23 and 23A.[7]

18. Section 16 imposes SGC 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 super 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 SGC is payable until:

    - the employer self-assesses their liability for the charge by lodging a superannuation guarantee statement for a quarter according to section 33, or
    - we assess an employer's liability for the charge under section 36.[7A]

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

[7] See section 23B.
[7A] In this regard, see the due dates for payment of SGC set out in section 46 and subsection 36(3).

22. Under section 43, the Commissioner has the general administration of the Act. As noted in *Grofam Pty Ltd & Ors v The Commissioner of Taxation of the Commonwealth of Australia* [1997] FCA 660, provisions such as section 43 provide the Commissioner with a wide power that includes the power to settle or compromise matters in dispute. Spender J said in *Precision Pools P/L v Commissioner of Taxation & Anor; QLD Pool & Spa Const. P/L v Commissioner of Taxation & Anor* [1992] FCA 746 at [23]:

> … [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 on 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] 1 AC 617. At [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 2 English cases have been endorsed by the courts in Australia. In *Pickering, Lawrence D & Ors v Deputy Commissioner of Taxation* [1997] FCA 890, Cooper J noted that the 2 English cases had been cited with approval in *David Jones Finance & Investments Pty Ltd & Anor v Commissioner of Taxation* [1990] FCA 448 and on appeal in *David Jones Finance & Investments Pty Ltd & Anor v Commissioner of Taxation of the Commonwealth* [1991] FCA 139, *Ando Minerals N.L. v. Deputy Commissioner of Taxation of the Commonwealth of Australia* [1994] FCA 115 and *Federal Commissioner of Taxation v Biga Nominees Pty Ltd* [1988] VR 1006.

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, you may decide not to assess the SGC.

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 SGC 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 SGC 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, you 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.[8] However, as outlined in paragraphs 11 to 12 of this Practice Statement, you may decide not to raise an SGC assessment where the clearing house is not an agent of the employer and the circumstances outlined in paragraph 13 of this Practice Statement apply to the employer.

29. The following examples illustrate how this Practice Statement is to be applied.

Example 1 – contribution sent within 28 days of the end of the quarter by post

30. *An employer whose business is based in Cairns is liable to make superannuation contributions for employees for the quarter ending 30 June. On 25 July, a Thursday, the employer posts a cheque to a fund's office in Sydney. The fund receives, and banks, the employer's cheque on Tuesday 30 July. The last day for contributions to be made for the June quarter is Monday 29 July (because the normal due date for contributions falls on a Sunday). The cheque is honoured on presentation by the fund's bank. The amount contributed satisfies 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 that the employees have benefited from appropriate superannuation support. Further, it is reasonable for the employer to allow 3 business days for the cheque to be received by the super fund.*

Example 2 – contribution sent within 28 days of the end of the quarter by electronic fund transfer

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

33. *An SGC assessment need not be made in this case. It is clear that the employees have benefited from appropriate superannuation support. Further, it is reasonable for the employer to allow 2 business days for the funds transferred electronically to be received by the super fund (RSA or the approved clearing house).*

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[8] This includes interest and administration penalties pursuant to the SGAA.

Example 3 – an employee does not update fund details with employer

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 SGC assessment need not be made in this case. It is clear 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 is unaware of the employee's change of fund and the employer acts reasonably and promptly in seeking to make a new contribution on behalf of the employee.*

Example 4 – employee fund account no longer exists

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, who 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 SGC assessment need not be made in this case. It is clear 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, they could not reasonably be expected to know of the change. The employer acts reasonably and promptly in seeking to make a new contribution on behalf of the employee.*

Example 5 – employee superannuation holding account special account closed

38. *An employer attempts to pay their June 2006 quarter superannuation guarantee contributions to the SHA special account on 10 July 2006, which closed for employer contributions on 30 June 2006. The employer tries to make this payment unaware of the closure of the SHA special account. We return the cheque to the employer, who 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 SGC assessment need not be made in this case. It is clear 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 acts*

reasonably and promptly in seeking to make a new contribution on behalf of the employee.

Example 6 – employee provides incorrect fund details

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 SGC assessment need not be made in this case. It is clear 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 is unaware that the employee had given incorrect fund details. The employer acts reasonably and promptly in seeking to make a new contribution on behalf of the employee.*

Example 7 – the employer allowed a clearing house (other than an approved clearing house) reasonable time to make the contributions

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 has sufficient funds to meet the contributions liability on 14 October.*

44. *An SGC assessment need not be made in this case. It is clear 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.*

Example 8 – a clearing house (other than an approved clearing house) makes a late contribution on behalf of the employer

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 of this Practice Statement.*

46. *An SGC assessment 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 actions.*

Example 9 – a tax agent makes a late contribution on behalf of the employer

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 2.5 months after the due date.*

48. *An SGC assessment must be made in this case. As the tax agent is the employer's agent, the acts or omissions of the tax agent are taken to be the employer's actions.*

Amendment history

26 September 2024

Part	Comment
Throughout	Content checked for technical accuracy and currency. Updated in line with current ATO style and accessibility requirements.

17 December 2021

Part	Comment
Paragraph 2	Updated to explain that the Practice Statement does not apply to a particular situation arising under the stapled super fund measure.
Footnote 1A	Inserted to provide reference to a legislative instrument that provides guidance on particular situation arising under the stapled super fund measure.
Paragraphs 22 and 25	Updated Australian court citations to medium neutral citations.
Various	Various updates made throughout practice statement to correct aesthetic issues with document – for example, changing some font from normal to italic, insertion of non-breaking spaces and hyphens, and correction to footnote indentations.

1 May 2012

Part	Comment
Paragraph 29	Deleted as subject matter not relevant to the object of the document.

27 October 2011

Part	Comment
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

Part	Comment
Various	Updated to include the introduction of the approved clearing house measure.

12 May 2010

Part	Comment
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

Part	Comment
Various	Minor currency revisions to remove references to withdrawn PS LA 2006/5.

References

Legislative references	SGAA 1992 16 SGAA 1992 22 SGAA 1992 23 SGAA 1992 23A SGAA 1992 23B SGAA 1992 Pt 3A SGAA 1992 32D(ca) SGAA 1992 33 SGAA 1992 36 SGAA 1992 36(3) SGAA 1992 43 SGAA 1992 46 SGAA 1992 79A(2) SGAA 1992 79A(3) SGAR 2018 24 Tax Laws Amendment (2010 Measures No. 1) Act 2010
Other references	Superannuation Guarantee (Administration) – Stapled Fund – Guidelines for the Reduction of an Employer's Individual Superannuation Guarantee Shortfall for Late Contributions Due to Non-Acceptance by Notified Stapled Fund Determination 2021 (link available internally only)
Related public rulings	SGD 2005/2 TR 2010/1
Related Practice Statements	PS LA 2006/6
Case references	Ando Minerals N.L. v. Deputy Commissioner of Taxation of the Commonwealth of Australia [1994] FCA 115; 94 ATC 4163; 27 ATR 593 David Jones Finance & Investments Pty Ltd & Anor v Commissioner of Taxation [1990] FCA 448; 90 ATC 4730

	David Jones Finance & Investments Pty Ltd & Anor v Commissioner of Taxation of the Commonwealth [1991] FCA 139; 28 FCR 484; 91 ATC 4315; 21 ATR 1506; 99 ALR 447 Federal Commissioner of Taxation v Biga Nominees Pty Ltd [1988] VR 1006 VicRp 91; 88 ATC 4270; (1988) 19 ATR 1037 Grofam Pty Ltd & Ors v The Commissioner of Taxation of the Commonwealth of Australia [1997] FCA 660; 97 ATC 4656; 36 ATR 493 IRCs v National Federation of Self Employed & Small Business Ltd [1982] 1 AC 617 Pickering, Lawrence D & Ors v Deputy Commissioner of Taxation [1997] FCA 890; 97 ATC 4893; 37 ATR 41 Precision Pools P/L v Commissioner of Taxation & Anor; QLD Pool & Spa Const. P/L v Commissioner of Taxation & Anor [1992] FCA 746; 37 FCR 554; 92 ATC 4549; 24 ATR 43; 109 ALR 679 Vestey v Inland Revenue Commissioners [1980] AC 1148; [1979] 3 All ER 976; [1979] 3 WLR 915
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