PS LA 2003/11 - Remission of penalty for failure to withhold as required by Division 12 in Schedule 1 to the Taxation Administration Act 1953

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ATO Practice Statement Law Administration

PS LA 2003/11

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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 officers unless doing so creates unintended consequences. Where this occurs ATO officers must follow their Business Line's escalation process.

SUBJECT: **Remission of penalty for failure to withhold as required by Division 12 in Schedule 1 to the *Taxation Administration Act 1953***

PURPOSE: **This Practice Statement sets out guidelines for the remission of penalty for failure to withhold as required by Division 12 in Schedule 1 to the *Taxation Administration Act* 1953.**

STATEMENT

1. This Practice Statement explains how ATO officers will exercise the discretion to remit penalties imposed under section 16-30 and section 16-40 in Schedule 1 to the *Taxation Administration Act 1953* ('the TAA') for failure to withhold an amount as required by Division 12 in Schedule 1 to the TAA ('Division 12').

2. This Practice Statement covers failure to withhold penalties imposed on all entities except failure to withhold penalty imposed on 'exempt Australian government agencies'[1] under section 16-35 in Schedule 1 to the TAA. This Practice Statement relates to withholding payments[2] made from 1 July 2002.[3]

3. The Commissioner may remit all or part of a penalty under section 16-30 in Schedule 1 to the TAA (section 16-45 in Schedule 1 to the TAA). The decision to remit the penalty amount will be based on the circumstances of the case under consideration and the entity's behaviour ('the remission decision').

4. The remission decision should be made:

   - in accordance with the individual circumstances of the case; and
   - consistent with the principles of the *Taxpayers' Charter* and the *ATO Compliance Model*.

[1] 'Exempt Australian government agency' is defined in section 995-1 of the *Income Tax Assessment Act 1997* ('ITAA 1997'). Sections 16-35 and 16-40 impose failure to withhold penalties relating to exempt Australian government agencies.
[2] The term 'withholding payment' is defined in section 995-1 of the ITAA 1997 and includes: 'a payment from which an amount must be withheld under Division 12 in Schedule 1 to the TAA'.
[3] See paragraphs 34 to 38 for remission of penalties for payments made before 1 July 2002.

5. The overriding principles are that payers receive recognition for the effort that they have made to comply but are also held accountable for their actions and the actions of their agents or authorised representatives.

6. In making a remission decision ATO officers should consider the factors outlined at paragraphs 20 to 32.

7. ATO officers should refer to the *ATO Receivables Policy*[4] for guidance on the remission of the general interest charge ('GIC') that section 16-50 in Schedule 1 to the TAA imposes on any unpaid penalty amounts.

8. ATO officers must give written notice of the remission decision to the entity who is liable to pay the penalty.

9. ATO officers making remission decisions should record the following information on the appropriate information technology system (for example TDMS):

   - relevant facts relating to the failure to withhold;
   - the remission decision (that is, the level of penalty remission and relevant calculations);
   - the reasons for the decision (that is, the ATO officer's consideration of the circumstances relevant to the decision);
   - the written notice of the remission decision given to the entity; and
   - any other relevant information.

EXPLANATION

10. The PAYG withholding system is contained in Part 2-5 in Schedule 1 to the TAA. Division 12 of Part 2-5 requires an entity (the payer) to withhold an amount from certain payments made to an individual or other entity (the payee).

11. Section 16-70 in Schedule 1 to the TAA requires the entity to pay amounts withheld to the Commissioner.

12. No administrative penalty applies where an entity withholds an amount from a payment as required, notifies the Commissioner of the amount as required, but fails to pay this amount to the Commissioner by the due date. However, the GIC will apply to these late payments (section 16-80 in Schedule 1 to the TAA). ATO officers should refer to the *ATO Receivables Policy* for guidance on this issue.

13. An entity that fails to withhold an amount as required by Division 12 is liable to a penalty ('the penalty amount') equal to the amount that the entity failed to withhold (subsection 16-30(1) in Schedule 1 to the TAA).

14. Although the penalty amount is equal to the amount that the entity should have withheld, it should be emphasised that it is a penalty rather than a means of collecting amounts that should have been withheld from payments. Payees are not

[4] The *ATO Receivables Policy* can be found on *ATO*law and at ato.gov.au.

entitled to a credit where their payer did not withhold an amount from their payments, even if their payer has paid a penalty amount for failure to withhold.[5]

15. The penalty amount is payable on the date that the amount required to be withheld by Division 12 should have been paid to the Commissioner (subsection 16-30(2) in Schedule 1 to the TAA).

16. The Commissioner may remit all or part of the penalty amount (section 16-45 in Schedule 1 to the TAA). Consideration for the remission of a penalty amount should be made at the time the penalty is imposed.

17. If the penalty amount remains unpaid after it is due, the entity is also liable to a GIC on the unpaid penalty amount (section 16-50 in Schedule 1 to the TAA).

18. The Commissioner has the discretion to remit all or part of the GIC to which an entity is liable (section 8AAG of the TAA). An entity may request that the GIC be remitted, however, the onus is on the entity to show that remission is warranted. ATO officers making decisions on the remission of the GIC should do so in accordance with the guidelines in the *ATO Receivables Policy*.

19. As an alternative to an administrative penalty for failing to withhold, the Commissioner can seek to have an offence prosecuted by referring the matter to the Director of Public Prosecutions. The Commissioner will generally not seek to prosecute unless the case involves serious non-compliance. This is in keeping with the Compliance Model concept that the most severe compliance strategies are to be restricted to those who are most non-compliant. The Tax Office policy on prosecution is fully explained in the *ATO Prosecution Policy*[6]. Where prosecution action is instituted, the entity is not liable for a civil or administrative penalty for the same offence (section 8ZE TAA).

Factors to consider when making a remission decision

20. The main features of our approach to remission of penalties for failure to withhold are:

- the remission levels deal with a range of behaviours varying from a voluntary disclosure to a deliberate decision not to comply;
- attempts to hide non-compliance or mislead the Tax Office result in a lower level of remission;
- a voluntary disclosure is rewarded through higher remission levels; and
- a repeat occurrence results in a lower level of remission.

21. To maintain consistency with other tax penalties, the starting point for considering penalty remission is to consider the entity's conduct both at, and leading up to, the time that the failure to withhold occurred. ATO officers should determine the extent of penalty remission on a case by case basis using the remission levels shown in the table below as a guide.

[5] Payees are only entitled to a credit on assessment for amounts withheld from withholding payments made to them during the year (section 18-15 in Schedule 1 to the TAA).
[6] The *ATO Prosecution Policy* can be found on *ATO*law and at ato.gov.au.

Description	Level of remission	Penalty Amount
Intentional disregard An entity knowingly decides not to withhold the correct amount as required by Division 12.	25%	75%
Recklessness An entity's actions demonstrate gross carelessness showing a disregard or indifference to their obligations.	50%	50%
Failure to take reasonable care An entity fails to exercise the care that a reasonable, ordinary, entity would exercise to fulfil the entity's tax obligations.	75%	25%
Voluntary disclosure On their own initiative an entity brings to the attention of the Tax Office, details of a payment from which they have failed to withhold the correct amount.	100%	0%

22. The figures referred to in the above table are percentages of the amount that the entity failed to withhold. These levels of remission are a starting point before taking into account additional factors which will either increase or decrease the penalty amount, based on the circumstances of the entity. See paragraphs 28 to 32 below.

23. The terms used in the above table are not new. A full explanation of the terms 'intentional disregard', 'recklessness' and 'reasonable care' can be found in Taxation Ruling TR 94/4.[7] A full explanation of the term 'voluntary disclosure' can be found in Taxation Ruling TR 94/6.[8]

Voluntary disclosure

24. As stated in the table above, an entity will be considered to have made a voluntary disclosure where on their own initiative they have brought to the attention of the Tax Office details of a payment from which they have failed to withhold the correct amount.

25. A voluntary disclosure must be a true and correct written statement that contains all the material facts for it to qualify for the concessional treatment afforded to voluntary disclosures.

26. An entity will be taken to have used its own initiative in relation to making a voluntary disclosure if the disclosure is made before being told of anticipated audit action by the Tax Office.

27. However, repeated voluntary disclosures by an entity may indicate the entity is being careless. Where this is the case, the remission of penalty for voluntary disclosure should not apply.

[7] Taxation Ruling TR 94/4 – Income tax: tax shortfall penalties: reasonable care, recklessness and intentional disregard.
[8] Taxation Ruling TR 94/6 – Income tax: tax shortfall penalties: voluntary disclosures

Factors that may increase or decrease the level of penalty

28. After considering the remission levels in the table at paragraph 21, the next step is for the ATO officer to determine whether there are any factors that will increase or decrease the level of penalty. These are sometimes called 'aggravating'[9] or 'mitigating'[10] circumstances.

29. Factors that may increase or decrease the level of penalty should be considered and adjustments made, if appropriate, to the penalty that has been determined using the table in paragraph 21.

30. The penalty should be increased by 20 per cent where an entity has failed to withhold an amount from a payment as required by Division 12 and:

- has taken steps to prevent or obstruct the Commissioner from finding out about the failure to withhold; or
- has become aware of the failure to withhold and has not taken steps to rectify the matter; or
- has been penalised in a previous period for failing to withhold and the ATO officer considers the previous decision has not lasting effect on compliance improvement.

31. The penalty should be decreased by 20 per cent where an entity tells the Commissioner of a failure to withhold after the Commissioner has advised of an intention to conduct an audit and the disclosure can reasonably be estimated to have saved the Commissioner a significant amount of time or resources in the conduct of the audit.

32. Where an ATO officer considers the factors outlined in paragraphs 20 to 31 and concludes that no penalty should be remitted (for example, in cases of severe non-compliance) the case may be appropriate for referral to the Director of Public Prosecutions. See paragraph 19.

Remission of penalty amounts for payments made before 1 July 2002

33. The guidelines in this Practice Statement apply where the payment from which the entity failed to withhold, was made on or after 1 July 2002. Separate Practice Statements and Rulings apply for payments made before 1 July 2002.

Payments made from 1 July 2000 to 30 June 2002

34. Law Administration Practice Statement PS LA 2002/8[11] applies in respect of remission of failure to withhold penalties that relate to payments made from 1 July 2001 to 30 June 2002. Where an ATO officer determines from the guidelines in PS LA 2002/8 that the failure to withhold penalty will not be remitted in full[12], the

[9] Aggravating circumstances may lead to the penalty being increased.
[10] Mitigating circumstances may lead to the penalty being decreased.
[11] PS LA 2002/8 – Administration of penalties under the new tax system
[12] For example where the entity's skills and experience indicate that it is reasonable to conclude that the entity should have been aware of their withholding obligation. See paragraph 60 of PS LA 2002/8.

ATO officer may refer to the guidelines in paragraphs 20 to 32 above for guidance on the level of remission.[13]

35. Law Administration Practice Statement PS LA 2000/9[14] applies in respect of remission of failure to withhold penalties that relate to payments made from 1 July 2000 to 30 June 2001.

Payments made before 1 July 2000

36. Before 1 July 2000, an entity who made payments that fell within the ambit of the reportable payments system (RPS), the pay as you earn (PAYE) system or the prescribed payments system (PPS) was required to deduct tax instalments from those payments and remit the tax instalments deductions to the Commissioner.

37. Taxation Ruling TR 2000/3[15] continues to apply in respect of remission of failure to deduct penalties that relate to payments made between 1 July 1999 and 30 June 2000.

38. Taxation Ruling TR 97/8[16] continues to apply in respect of remission of failure to deduct penalties that relate to payments made before 1 July 1999.

[13] PS LA 2002/8 does not provide guidance on levels of remissions for PAYG withholding penalties.
[14] PS LA 2000/9 – Remission of penalties under the new tax system
[15] TR 2000/3 – Income tax: remission of penalty and General Interest Charge for failure to make deductions from RPS, PAYE and PPS payments
[16] TR 97/8 – Income tax: RPS, PAYE and PPS remission of penalty for failure to deduct tax

subject references:	Failure to withhold; PAYG withholding; Remission of penalty; Technical Decision Making System; TDMS
legislative references:	*Taxation Administration Act 1953* Part IIA Division 1 *Taxation Administration Act 1953* Schedule 1 Division 12 *Taxation Administration Act 1953* Schedule 1 Division 16
related public rulings:	Taxation Ruling IT 2246 Taxation Ruling TR 94/4 Taxation Ruling TR 94/6 Taxation Ruling TR 97/8 Taxation Ruling TR 2000/3
related practice statements:	Law Administration Practice Statement PS LA 2000/9 Law Administration Practice Statement PS LA 2002/8
case references:	
file references:	2003/014849

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