PS LA 2005/2 - Penalty for failure to keep or retain records

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Practice Statement Law Administration

PS LA 2005/2

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

SUBJECT: **Penalty for failure to keep or retain records**

PURPOSE: **To provide guidelines on:**

- **record keeping obligations, and**
- **the remission of administrative penalty imposed by section 288-25 of Schedule 1 to the *Taxation Administration Act 1953* for a failure to keep records.**

TABLE OF CONTENTS **Paragraph**

BACKGROUND **1**
Record keeping 1
Record keeping penalties 4
STATEMENT **6**
Australian Taxation Office (ATO) approach to record keeping 6
Record Keeping Penalty 8
Guidelines for remission of record keeping penalty 9
Repeat offences 13
Prosecution 14
EXPLANATION **15**
Record Keeping 16
Record and explain all transactions and other acts 18
Records in the English language 21
Entity's tax-related liability to be able to be readily ascertained 23
Retention period for records 26
Record Keeping Penalty 27
Remission of administrative penalty 31
Taxpayers' Charter 38

The Compliance Model 39
Good decision making model 41
Prosecution 43
Appendix 1 **Page 10**
Appendix 2 **Page 11**

BACKGROUND

Record keeping

1. There are various record keeping obligations contained in the laws administered by the Commissioner of Taxation. A list of the various record keeping provisions is contained in Appendix 1.

   This Law Administration Practice Statement focuses on the more general of these:

   - the requirements of section 262A of the *Income Tax Assessment Act 1936* (the ITAA 1936), and
   - section 382-5 of Schedule 1 to the *Taxation Administration Act 1953* (TAA).

2. While this Law Administration Practice Statement focuses on the general record keeping provisions, the principles apply equally to the other record keeping requirements.

3. This Law Administration Practice Statement does not apply in relation to the record keeping requirements imposed by the *Excise Act 1901*, the *Distillation Act 1901*, the *Spirits Act 1906* and the *Fuel (Penalty Surcharges) Administration Act 1997*. Also, this Law Administration Practice Statement does not apply in relation to documents required to be kept under Part X of the *Fringe Benefit Tax Assessment Act 1986* or Division 900 (substantiation rules) of the *Income Tax Assessment Act 1997*.

Record keeping penalties

4. Section 288-25 of Schedule 1 to the TAA imposes an administrative penalty where a provision of a taxation law requires an entity to keep or retain records and the entity does not keep or retain records in a manner required by that taxation law. This administrative penalty applies to record keeping obligations that arise on or after 1 July 2000.

5. The Commissioner may choose to remit part or all of a record keeping penalty (section 298-20 of Schedule 1 to the TAA).

STATEMENT

Australian Taxation Office (ATO) approach to record keeping

6. The ATO's approach to record keeping is to influence a positive change in the compliance behaviour by educating and assisting entities in a way that will help them meet their record keeping obligations.

7. The main features of the approach are as follows:

- Tax officers will normally provide help and education to entities as the first step in improving record keeping practices.
- An entity will usually be given the opportunity to improve its record keeping before a record keeping penalty is considered.
- Revisits will be undertaken in high risk cases to ensure our help and educate approach has had a positive influence in changing record keeping behaviour.
- Where the ATO is satisfied an entity is reporting the correct tax-related liability, any record keeping penalty that the entity is otherwise liable to pay will usually be remitted in full.
- Where the records kept by the entity are such that the ATO cannot verify that the entity is reporting the correct tax-related liability, the record keeping penalty will not usually be remitted in full, however consideration may be given to a partial remission.
- Where a shortfall results from a record keeping practice, the entity's approach to record keeping is one of the factors to be considered in determining the behaviour of the entity, and consequently the amount of shortfall penalty that will apply (Miscellaneous Taxation Ruling MT 2008/1 provides guidance on the effect record keeping has on determining behaviour).
- An entity that makes no attempt to keep records or deliberately destroys its records is unlikely to receive any remission of the penalty.
- Where an entity's records have been lost or destroyed in circumstances outside the entity's control, this will not be seen as a failure to comply with the record keeping provisions. (In these circumstances the entity is expected to reconstruct records to the best of their ability).
- Entities that use electronic records are expected to retain back up copies or have some other method to enable them to readily reconstruct their accounts.
- An entity will generally not be penalised more than once for failing to comply with its obligations to keep records for a particular accounting period under the various Acts administered by the Commissioner. For example, only one record keeping penalty will apply in cases where an entity fails to keep records for income tax purposes and also fails to keep the same records for superannuation guarantee purposes.

Record Keeping Penalty

8. The record keeping penalty is one of the final actions taken in an effort to influence a change in an entity's record keeping behaviour and, in most cases, will be used only where help and education have failed to change behaviour.

Guidelines for remission of record keeping penalty

9. Generally the ATO will not remit record keeping penalties where an entity has:

- made little or no attempt to keep and maintain any records;
- deliberately destroyed records within the period during which they are required to be kept; or
- intentionally omitted records of transactions.

10. Any decision to remit record keeping penalties is to be made in accordance with the principles of the compliance model and the taxpayers' charter.

11. Where an entity has been provided with record keeping advice and given the opportunity to improve their record keeping behaviours, but continues to demonstrate non-compliance, penalties will be determined as set out in the following table.

Record keeping behaviour	**Remission level**	**Penalty units imposed**	**Penalty amount***
Genuine attempt made to improve record keeping practices	100% remission	0 unit	$0
Some effort made but tax liability still not readily ascertainable	75%	5 units (considered to be an appropriate level to acknowledge taxpayer's effort but at the same time not condoning non-compliant behaviour)	$550
Very little effort made to improve record keeping practices	50%	10 units	$1100
No effort made to improve record keeping practices	No remission	20 units	$2200

* based on penalty unit value of $110 (see paragraph 28 of this practice statement)

12. In order to ensure consistency, any decision in relation to the remission of the administrative penalty for failure to keep records must be referred to an officer at the EL2 level for approval.

Repeat offences

13. Where an entity has been penalised previously for non-compliant record keeping, and current non-compliance is similar in nature to the previous instance, a lesser remission will generally be warranted.

Prosecution

14. Where an entity demonstrates continued neglect of its record keeping obligations after it has been penalised under section 288-25 of Schedule 1 to the TAA, the tax officer should consider referring the matter to the Director of Public Prosecutions (DPP) for prosecution. The tax officer must refer to the *ATO Prosecution Policy* in deciding whether the non-compliance warrants referral for prosecution. (See paragraphs 41 to 45 of this practice statement for more detail.)

EXPLANATION

15. This Law Administration Practice Statement explains the ATO's approach to the record keeping obligations imposed on entities by the various taxation laws for which the Commissioner has administrative responsibility. The main focus of this approach is to influence a positive change in compliance behaviour by educating and assisting entities in a way that will help them meet their record keeping obligations.

Record Keeping

16. The general record keeping provisions contained in section 262A of the ITAA 1936 and section 382-5 of Schedule 1 to the TAA require an entity to keep records:

    - that record and explain all transactions and other acts engaged in by the person that are relevant for the purposes of the relevant Act;
    - that are in English or are readily accessible and convertible into English;
    - that enable the entity's liability under the relevant Act to be readily ascertained.

17. Generally these records must be kept for 5 years, however there are some exceptions including records in relation to assets affected by the capital gains laws (see paragraph 26 of this practice statement) and documents required to be kept by Shorter Period of Review (SPOR) taxpayers. Care should be taken to ensure that the correct period for the retention of records and documents is identified.

Record and explain all transactions and other acts

18. In the normal course of carrying on an enterprise, entities generally create a record at the time of the transaction or act to which it relates. This ensures that a record of each event is made as it occurs, reducing the possibility of incorrectly reporting a tax-related liability or over claiming a credit. There will be times when this is neither appropriate, nor possible due to the nature of the business. In these situations, a record of the transaction or act should be made as soon as practicable after the transaction or event occurred.

19. Entities are also required to keep and retain documents in relation to any election, choice, estimate, determination or calculation made under a taxation law. The documents should contain the particulars of any election, choice, estimate, determination or calculation. In the case of an estimate, determination or calculation, the documents should also contain the basis on which, and the method by which the estimate, determination, or calculation was made.

20. The ATO recognises that there may be isolated instances where an entity misplaces or loses documents that explain a particular transaction. Where an entity has exercised reasonable care in keeping and maintaining its records, but has unintentionally misplaced or lost isolated documents, any record keeping penalty that would otherwise be applicable will be remitted in full.

Records in the English language

21. An entity is obliged to keep records in the English language or in a form which enables the records to be readily accessible and convertible into writing in the English language.

22. Records may be kept in electronic form, provided they are readily accessible and convertible into writing in English.

Entity's tax-related liability to be able to be readily ascertained

23. The records are to be kept in a manner so as to enable the entity's liability or claim for credit under the relevant Act to be readily ascertained. The nature of the records required to be kept will depend, among other things, on the nature and size of the enterprise. For large entities, the nature of the records required to be kept may depend upon the internal controls employed to ensure the integrity of the accounting system.

24. Taxation Ruling TR 96/7 provides guidance on the type of records that, if maintained, will ensure that the record keeping provisions in section 262A of the ITAA 1936 are met. The provisions of section 262A of the ITAA 1936 are very similar to the general record keeping provisions of the other taxation laws administered by the Commissioner. Therefore, principles outlined in TR 96/7 are equally applicable to the other taxation laws. Paragraphs 53 to 57 of the Ruling are reproduced in Appendix 2 and provide guidance on the meaning of 'readily ascertained'.

25. If records are kept in encrypted form, the entity must (on request) provide the ATO with either decrypted records or the encryption key and all other means required to decrypt the records.

Retention period for records

26. Generally records are required to be kept for 5 years. However, the events that mark the beginning or the end of the retention period vary according to the relevant provisions of the particular law. Care should be taken to ensure that the correct period is identified, for example, records relating to capital purchases will generally be required to be kept from the date of purchase until 5 years after the capital gains tax event (such as a disposal) has occurred.

Record Keeping Penalty

27. Section 288-25 of Schedule 1 to the TAA imposes an administrative penalty where an entity fails to keep and retain records in the manner required by a taxation law. The section applies in relation to the record keeping provisions of all taxation laws of which the Commissioner has the general administration. However, section 288-25 expressly excludes documents required to be retained under Part X of the *Fringe Benefits Tax Assessment Act 1986* and documents required to be kept under Division 900 of the *Income Tax Assessment Act 1997*.

28. The penalty under section 288-25 is 20 penalty units. Currently, subsection 4AA(1) of the *Crimes Act 1914* provides that the value of one penalty unit is $110. The record keeping penalty is therefore $2,200.

29. Where an entity incurs a record keeping penalty, Section 298-10 of Schedule 1 to the TAA requires the Commissioner to give written notice to the entity of its liability to pay the penalty and of the reasons why the entity is liable to pay the penalty. The amount of penalty notified should be the amount remaining after any remission of part of the penalty. The notice must include notification of the amount of the penalty and the due date for payment of the penalty. The due date must be at least 14 days after the notice is given to the entity (Section 298-15 of Schedule 1 to the TAA).

30. Where a penalty remains unpaid after it is due, the entity will be liable to pay the general interest charge (GIC) on the outstanding amount (section 298-25 of Schedule 1 to the TAA).

Remission of administrative penalty

31. Section 298-20 of Schedule 1 to the TAA allows the Commissioner to remit all or part of the penalty imposed under section 288-25.

32. If the Commissioner decides not to remit all or any part of the penalty, he must provide the entity with a written notice of this decision.

33. When the penalty is remitted in full, a formal notice of the reasons for the decision is not required under the legislation. However, for the purposes of encouraging future compliance and in accordance with the taxpayer's charter, the entity should still be advised of the outcome and reasons for the decision. This advice may be included in any other written communication such as a case finalisation letter.

34. An entity may object to a remission decision where the penalty payable after the decision is greater than 2 penalty units, and the entity is dissatisfied with the decision. The objection is to be in the manner set out in Part IVC of the TAA.

35. Therefore, where an entity is liable to a record keeping penalty under section 288-25 of the TAA, the tax officer must consider whether it is appropriate to remit any, or all, of the penalty. A 'one size fits all' approach is inappropriate. If the ATO treats entities who are genuinely trying to meet their obligations in the same manner as we treat those who are wilfully non-compliant, the effect is damaging to the public's perception of the fairness of the taxation system. Tax officers should treat each entity according to its circumstances.

36. The level of remission (if any) of the penalty will be determined by reference to:

    - the principles in the Taxpayers' Charter,
    - the compliance model, and
    - the good decision making model.

    In making the remission decision, officers must consider any effort made by the entity to improve their record keeping practices.

37. The appropriate use of record keeping software listed on the Registered Software Facility Product Register (RSF Product Register), will generally meet the requirements under the various taxation laws to keep records in a manner that allows an entity's tax liability to be readily ascertained.[1]

Taxpayers' Charter

38. Decisions on the remission of the record keeping penalty should always be made with the Taxpayers' Charter principles in mind. Charter principles that are relevant to a remission decision include:

- treating taxpayers in a fair and reasonable manner, and
- treating them as being honest in the absence of evidence to the contrary.

The Compliance Model

39. Any decision on the remission of penalties should be considered in light of where the entity sits within the compliance model and its attitude to compliance. The Compliance Model consists of three parts:

- BISEP (Business, Industry, Sociological, Economic and Psychological) factors
- attitudes to compliance, and
- compliance strategies.

40. Entities should receive recognition for the efforts they have made to comply but must also be held accountable for their actions/omissions and those of their authorised representatives.

Good decision making model

41. Tax officers must ensure their remission decisions are consistent with the good decision-making model. [This link only available within the ATO.] That is, the decision must be legal, ethical, equitable, overt, sensible, timely and in accordance with the principles of natural justice. Although the law provides for penalties to be imposed at a certain level, the facts and circumstances of a case may be such that the imposition of a penalty at that level might not be an appropriate or desirable outcome.

42. The concessional approach to remission of penalties in the transitional period covered in Law Administration Practice Statement PS LA 2002/8 does not apply where an entity fails to keep and retain appropriate records to support any claims made in a document lodged with the Commissioner. (Paragraph 54 of PS LA 2002/8).

[1] Information on the RSF Product Register can be obtained on the ATOConnect web site at http://intranet/content/26/26351.htm. The RSF Product Register is available on the ATO's external web site at www.ato.gov.au/rsf/business (please note internet access is necessary to use this link).

Prosecution

43. As an alternative to the administrative penalty in section 288-25, the Commissioner can seek to have an offence prosecuted by referring the matter to the Director of Public Prosecutions (DPP).

44. The TAA provides for three separate offences for incorrectly keeping records:

- section 8L Incorrectly keeping records;
- section 8Q Recklessly incorrectly keeping records; and
- section 8T Incorrectly keeping records with intention of deceiving or misleading.

45. The most severe of these offences, incorrectly keeping records with the intention of deceiving or misleading the Commissioner, allows for a fine up to $5,000 or imprisonment for a period not exceeding 12 months, or both, for a first offence. For subsequent offences the penalty is increased to a fine of up to $10, 000 or imprisonment for a period not exceeding two years, or both.

46. The ATO will consider referring a case to the DPP only where the case involves serious non-compliance such as falsifying records and fraud, or where the imposition of penalties under section 288-25 of Schedule 1 to the TAA has failed to improve the entity's record keeping behaviour. This is in keeping with the compliance model principles that the most severe compliance responses are to be restricted to those entities that are the least compliant.

47. The ATO policy on prosecutions is fully explained in the *ATO Prosecution Policy*. Where prosecution action is instituted the entity is not liable for a civil or administrative penalty for the same offence [section 8ZE TAA]. This is so even if the prosecution is later withdrawn.

Appendix 1

Type of provision	**Act**	**Legislative reference**
General provision - records to be kept: • that record and explain all transactions; • are in English or so as to be readily accessible and easily convertible into English; • that enable the entity's liability under the relevant Act to be readily ascertained; • for 5 years (except if otherwise indicated).	*Income Tax Assessment Act 1936*	Section 262A
	Fringe Benefit Tax Assessment Act 1986	Section 132
	Superannuation Guarantee (Administration) Act 1992	Section79
	Petroleum Resource Rent Tax Assessment Act 1987	Section 112 (records must be retained for 7 years)
	Taxation Administration Act 1953 (for indirect taxes)	Section 382-5
	Taxation Administration Act 1953 (for Minerals Resource Rent Tax)	Division 123
Other types	**Act**	**Legislative reference**
Accruals system of taxation of certain non-resident trust estates	*Income Tax Assessment Act 1936*	Section 102AAZG
Controlled foreign companies	*Income Tax Assessment Act 1936*	Part X Division 11
Foreign investment funds and foreign life assurance policies	*Income Tax Assessment Act 1936*	Part XI Division 22
Forgiveness of commercial debts	*Income Tax Assessment Act 1936*	Schedule 2C section 245-265
Capital gains tax	*Income Tax Assessment Act 1997*	Part 3-1 Division 121
Thin capitalisation	*Income Tax Assessment Act 1997*	Subdivision 820-L
Wool tax	*Wool Tax (Administration) Act 1964*	Section 89

Taxation Ruling TR 96/7 – Paragraphs 53 to 57 reproduced

Manner of keeping records

53. Clause 42 of the Explanatory Memorandum [to the Taxation Laws Amendment Bill No 5 of 1989] … makes it clear that paragraph 262A(3)(a) was introduced to cover the keeping of electronic records. It states that:

> 'Subsection 262A(3) obliges a person who is required by the section to keep records, to keep those records:
>
> > by paragraph (a) – in the English language or, if not in written form (eg, in an electronic medium such as magnetic tape or computer disc), in a form which is readily accessible and convertible into writing in English.'

54. We consider that the requirement in paragraph 262A(3)(b) that a person must keep records so as to 'enable' the person's liability under the Act to be readily ascertained, refers to the ability of ATO staff to be able to readily ascertain that person's liability. This is consistent with the underlying purpose of section 262A to assist the Commissioner in ascertaining a person's liability. We recognise that ATO staff need to have accounting skills to be able to readily ascertain a person's liability.

55. The *Macquarie Dictionary* defines 'readily' as:

> '1. promptly; quickly; easily.'

It defines 'ascertain' as:

> 'to find out by trial, examination or experiment, so as to know as certain; determine.'

Generally, we would expect that ATO staff with accounting skills would be able to quickly and easily determine a person's taxation liability without needing too much assistance from that person. However, we recognise that because of the complexity of some businesses, ATO staff will find it useful to have the helpful assistance of the person and/or the person's representative to readily ascertain the person's liability.

56. There are circumstances where it is possible for ATO staff to readily ascertain a person's liability from the records referred to in paragraphs 19 and 20 above. This would be the case where the simple nature of the business is such that those records easily show the person's income and expenditure (see Example 2 in this Ruling). However, in most circumstances, businesses do not operate in this kind of environment and need accounting systems which trace business transactions from their source to the financial accounts. In that situation, it would not be possible for ATO staff to readily ascertain a person's liability without referring to those secondary records, eg, journals, ledgers and financial accounts, that provide a record of that system.

57. Paragraph 262A(4)(a) makes it clear that the records which are to be kept under section 262A must be kept for 5 years after the records were prepared or obtained, or the completion of the transactions to which they relate, whichever is the later. We believe that this is an ongoing obligation over the retention period. This view supports the Commissioner's ability to be able to readily ascertain a person's taxation liability at any time after the completion of the transactions. This is important because the Commissioner has the power to raise an assessment at any time under section 168 of the Act.

Amendment history

Date of amendment	Part	Comment
11 July 2012	Generally	Updated to current ATO publication style.
	Paragraph 7 and Related public rulings	Updated reference from MT 2008/D1 to MT 2008/1.
	Paragraph 37	Remove the reference to e-Record which is no longer available.
	Appendix 1	Added Minerals Resource Rent Tax record keeping provisions.
2 September 2008	Paragraph 7 and Related public rulings	Updated TR 94/4 to MT 2008/D1.
5 March 2008	Paragraph 29	Added requirement of Commissioner to provide reasons to entity of why the entity is liable to pay a penalty under section 298-10 of Schedule 1 to the TAA (as amended by No. 75 of 2005).
	Paragraph 33	New paragraph added to clarify ATO policy of provided reasons for decision where penalty remitted in full, although no requirement exists under legislation (section 298-20 of Schedule 1 to the TAA).
	Related practice statements	Added PS LA 2006/2 and PS LA 2007/3.
1 July 2006	References	Update reference to section 70 of the TAA to section 382-5 of Schedule 1 to the TAA.

Legislative references	Excise Act 1901 50 ITAA 1936 168 ITAA 1936 262A ITAA 1936 262(3) ITAA 1936 262(3)(a) ITAA 1936 262(3)(b) ITAA 1936 262(4)(a) ITAA 1936 102AAZG ITAA 1936 Pt X Div 11 ITAA 1936 Pt XI Div 22 ITAA 1936 Sch 2C 245-265 ITAA 1997 Div 121 ITAA 1997 Div 900 SGAA 1992 79 Superannuation Contributions Tax (Assessment and Collection) Act 1997 40 FBTAA 1986 Pt X FBTAA 1986 132 TAA 1953 8ZE TAA 1953 Sch 1 382-5 TAA 1953 Sch 1 288-25 TAA 1953 Sch 1 298-10 TAA 1953 Sch 1 298-15 TAA 1953 Sch 1 298-20 TAA 1953 Sch 1 298-25 Crimes Act 1914 4A Wool Tax (Administration) Act 1964 89 Petroleum Resource Rent Tax Assessment Act 1987 112 Product Grants and Benefits Administration Act 2000 Pt 5
Related public rulings	TR 96/7 TR 96/11 TR 2002/10 MT 2008/1
Related practice statements	PS LA 2000/9 PS LA 2002/8 PS LA 2006/2 PS LA 2007/3
Other references	*Taxpayers' charter* *Compliance model* *ATO prosecution policy* *Good decision-making model*
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