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

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

This Law Administration Practice Statement provides guidelines in relation to penalties for failing to keep or retain records when required to do so by a taxation law.

This Practice Statement is an internal ATO document and is 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.

1. What is this Practice Statement about?

This Practice Statement provides guidance on the administration of section 288-25 of Schedule 1 to the *Taxation Administration Act 1953* (TAA). All legislative references in this Practice Statement are to Schedule 1 to the TAA, unless otherwise indicated.

Section 288-25 makes an entity liable to a penalty if the entity does not keep or retain records in a manner required by a taxation law. It applies to record-keeping obligations that arise on or after 1 July 2000. These are listed in Attachment A to this Practice Statement.

Record keeping is necessary so we can verify that taxpayers are reporting correct tax-related liabilities. The purpose of the penalty in section 288-25 is to influence positive compliance with record-keeping obligations, resulting in accurate reporting of tax-related liabilities.

ATO staff will usually provide help and education to ensure taxpayers meet their record-keeping obligations. The assessment of a penalty under section 288-25 is one of the final actions taken in an effort to influence a change in an entity's record-keeping behaviour and will generally be used only where help and education have failed to change behaviour.

Where appropriate, ATO staff can issue a tax-records education direction (direction to educate) to a business instead of imposing the penalty. This Practice Statement provides guidance on when this is suitable. There is a similar direction available for failures to comply with record-keeping obligations under the *Superannuation Guarantee (Administration) Act 1992;* see Law Administration Practice Statement PS LA 2021/3 *Remission of additional superannuation guarantee charge.*

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

2. Administering the penalty

If a penalty is to be imposed, there are 5 steps to consider when administering the penalty in section 288-25. They are:

- Step 1 – determine if the law imposes a penalty
- Step 2 – determine if a direction to educate should be issued
- Step 3 – determine the amount of the penalty
- Step 4 – determine if remission is appropriate
- Step 5 – record the penalty and notify the entity.

3. General principles

The following general principles should be considered in administering section 288-25:

- The primary purpose of this penalty provision is to encourage entities to comply with their record-keeping obligations and, by extension, to accurately report their tax-related liabilities.
- In the normal course of carrying on an enterprise, entities generally create contemporaneous records of the transactions they enter into. This reduces the risk of incorrectly reporting a tax-related liability or over-claiming a credit.

- The general record-keeping provisions[1] 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, including the particulars of any election, choice, estimate, determination or calculations
  - are in English or are readily accessible and convertible into English, and
  - enable the entity's liability under the relevant Act to be readily ascertained.
- Generally, these records must 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. For example, records relating to the acquisition of a capital gains tax (CGT) asset are generally required to be kept from the date of purchase until 5 years after the relevant CGT event (such as a disposal) has occurred.
- The nature and scope of records to be retained will depend on the nature and size of the enterprise. Taxation Ruling TR 96/7 *Income tax: record keeping – section 262A – general principles* provides guidance on the type of records that, if maintained, will ensure that record-keeping obligations are met.
- The appropriate use of record-keeping software consistent with Law Administration Practice Statement PS LA 2008/14 *Record keeping when using commercial off the shelf software* will meet the requirements under the various taxation laws to keep records in a manner that allow an entity's tax liability to be readily ascertained.
- We recognise that there may be isolated instances where an entity misplaces or loses documents that explain a particular transaction. We will consider the circumstances in which the records were lost and what the entity has done to rectify the situation in deciding whether to remit the penalty.
- Entities that use electronic records are expected to retain backup copies or have some other method to enable them to readily reconstruct their accounts in the event of a system malfunction.
- Where records have been encrypted, entities must provide us with decrypted records, or the means required to decrypt the records.
- Where a shortfall results from a record-keeping practice, a shortfall penalty under Division 284 may also apply.[2] 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 *Penalty relating to statements: meaning of reasonable care, recklessness and intentional disregard* provides guidance on the effect record keeping has on determining behaviour. An entity can be liable to both a record-keeping penalty and a shortfall penalty in relation to the same tax obligation.
- 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. For example, only one record-keeping penalty will apply in cases where an entity fails to keep the same records required for both income tax and superannuation guarantee purposes for the same period.

Step 1 – determine if the law imposes a penalty

When is a penalty imposed for failing to keep or retain records?

A penalty under section 288-25 is imposed where an entity or their agent[3]:

- is required under a provision of a taxation law to keep or retain a record, and
- does not keep or retain the record in the manner required by that law.

An entity is not liable for an administrative penalty if prosecution action is commenced by the Commissioner for a civil penalty for the same offence[4], even if the prosecution is later withdrawn. The TAA provides for 3 separate offences for incorrectly keeping records:

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

[1] Section 262A of the *Income Tax Assessment Act 1936* and section 382-5.
[2] See Law Administration Practice Statement PS LA 2012/5 *Administration of the false or misleading statement penalty – where there is a shortfall amount*.
[3] Any reference to entity in this Practice Statement should be read as 'the entity or their agent', unless explicitly noted.
[4] Section 8ZE of the TAA.

The most severe of these offences occur under section 8T of the TAA and allow for a fine of up to 50 penalty units 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 100 penalty units or imprisonment for a period not exceeding 2 years, or both.

The ATO will consider referring a case to the Commonwealth Director of Public Prosecutions only where the case involves serious non-compliance, such as falsifying records and fraud, or where the imposition of administrative penalties has failed to improve the entity's record-keeping behaviour. The Commonwealth policy on prosecutions is fully explained in the Prosecution Policy.

Who is liable for the penalty?

The entity required by the taxation law to retain the records is the entity liable to the penalty.

Step 2 – determine if a direction to educate should be issued

What is a direction to educate?

A direction to educate is given to entities which we consider have failed to comply with their record-keeping obligations.[5] An entity that has been given a direction needs to complete our approved online record-keeping course. Successful completion of the course by the due date means the entity is no longer liable to the penalty.[6] The purpose of the direction is to help educate businesses about their tax-related record-keeping obligations.

Eligibility

A direction to educate can be issued where we believe an entity has made a reasonable and genuine attempt to comply with, or had mistakenly believed they were complying with, their tax record-keeping obligations.[7] The entity must not be disengaged from the tax system or deliberatively avoiding any of the obligations to keep records.

To be eligible, the entity must be carrying on a business. The direction is best suited for small business entities.[8]

The Commissioner cannot issue a direction to educate for record-keeping obligations under[9]:

- the *Superannuation Guarantee (Administration) Act 1992*[10]
- Part X of the *Fringe Benefits Tax Assessment Act 1986*
- Division 900 of the *Income Tax Assessment Act 1997.*

Considerations

Circumstances we consider when deciding whether to issue a direction to educate include whether:

- the business has knowledge gaps and would benefit from completion of the record-keeping course
- the failure to keep appropriate records has occurred due to unintentional mistakes or digital illiteracy
- the business appears to have made genuine attempts to comply with their tax obligations
- the business has not been issued a direction to educate previously
- the entity is new to business (for example, trading for less than 2 years)
- the business has cooperated with information requests.

Matters we consider when assessing whether an entity has disengaged from the tax system include:

- whether the business is engaged and responding to requests for information
- the business' compliance history
- the business' awareness of their tax obligations.

Relevant matters to consider when assessing whether an entity is deliberately avoiding any of their obligations to keep records include:

- suspected deliberate loss or destruction of documents by the entity
- suspected fabrication of documents by the entity
- possession and use of electronic sales suppression tools

[5] Section 384-12.
[6] Paragraph 288-25(2)(c).
[7] Paragraph 1.23 of the Explanatory Memorandum to the Treasury Laws Amendment (2022 Measures No. 2) Bill 2022 (EM).
[8] Paragraph 1.19 of the EM.
[9] Subsection 384-12(1).
[10] This is because the failure to comply with an obligation to keep records under that Act is separately covered by the superannuation guarantee education direction; see PS LA 2021/3 for the remission considerations relevant to these obligations.

- suspected omission or removal of cash transactions from sales records.

Issuing the direction

To issue the direction, the Commissioner must provide written notice to the business. The notice must specify a reasonable period for the business to comply with the direction.[11] This date will be negotiated with the business during the engagement process.

Varying the direction

The Commissioner can vary the terms of the direction to educate.[12] Circumstances where we might do this include:

- temporary unavailability of the online course
- natural disaster affecting the business
- correcting an error in a previously issued education direction.

A business may also request that a direction to educate be varied. The request must:

- be in writing
- set out the reasons for the variation, and
- be provided to the Commissioner before the end of the period specified in the education direction.

To help businesses to understand their record-keeping obligations, all reasonable extension requests received before the end of the period specified in the direction should be granted.

However, if the business requests a variation after the notice's due date, they have failed to comply with the direction and we will impose the penalty. We will not issue a new direction but we will encourage the business to complete the course.

The Commissioner can revoke the education direction in writing at any time. However, this should only occur in limited situations based on the business' circumstances. For example, a direction to educate may be revoked if it was addressed to the wrong person or business or sent to the wrong address. We might also revoke a direction prior to course completion if we become aware of information that means the entity is no longer eligible; for example, we receive further evidence that they are deliberately avoiding their obligations.

Complying with the direction

If an entity does not complete the course by the due date, they will be liable to the penalty. In order to comply with the direction, the relevant individual must be able to show evidence that they have completed the course by the end of the specified period. The relevant individual who must complete the course is:

- if the entity is a sole trader – the individual
- if the entity is a business – an individual who makes, or participates in making, decisions that affect the whole, or a substantial part, of the business. For example, if the entity is a company, a director or public officer of the company, or if the entity is a partnership, a partner in the partnership.

Step 3 – determine the amount of the penalty

Working out the penalty amount

The penalty is 20 penalty units.[13]

The penalty applicable is calculated on the value of the penalty unit at the time of the contravention, being when the records were required to be kept or retained.

Step 4 – determine if remission is appropriate

Considering whether to remit the penalty

The Commissioner has the discretion to remit all or part of the penalty.[14] This discretion is 'unfettered', meaning that there is no legal restriction on when we can and cannot remit. Remission provides the administrative flexibility to ensure the penalty imposed is aligned with the observed behaviour and the purpose of the penalty.

This Practice Statement sets out guidance that must be used in exercising this discretion. Remission is not limited to the reasons listed here and we should consider remission in any situation where the final penalty is not a just outcome. That is, if imposition of the penalty produces an unintended or unjust result, we may remit the penalty in whole or in part.

We must make a remission decision whenever the penalty is imposed. We may decide that there are no grounds for remission or that there are grounds to remit in full or in part. The final penalty we apply must be defensible, proper and have regard to the overall circumstances of the entity and the purpose of imposition and remission of this penalty.

[11] Subsection 384-15(2).
[12] Note to subsection 384-15(2); subsection 384-35(7).
[13] The value of a penalty unit is contained in section 4AA of the *Crimes Act 1914* and is indexed regularly. The dollar amount of a penalty unit is available at ato.gov.au/penalty
[14] Section 298-20.

We need to consider each case on its merits, having regard to all the relevant facts and circumstances.

Entities in the same circumstances should be treated consistently for remission purposes. This is particularly relevant for entities involved in examinations relating to the same arrangement. However, this should not be used as justification for replicating an incorrect penalty decision made in relation to another entity.

Relevant matters to consider in making a remission decision include:

- The purpose of the penalty provision is to encourage entities to comply with their record-keeping and tax-reporting obligations. Whether we are satisfied that an entity has reported the correct tax-related liability is therefore relevant.
- The penalty regime also aims to promote consistent and equitable treatment by reference to specified rates of penalty. This objective would be compromised if the penalties imposed at the rates specified in the law were remitted without just cause, arbitrarily or as a matter of course.
- The amount of the penalty the law imposes is not a valid reason for remission alone in the absence of specific reasons why it would be unjust in the entity's particular circumstances.

Matters that we should not usually consider include:

- behaviour or situations unrelated to the relevant record-keeping and tax-reporting obligation, such as the entity or registered agent becoming ill at a time after the failure to keep records occurred
- whether there is a capacity to pay the penalty.[15]

Additional remission considerations – direction to educate

The purpose of a direction to educate is to ensure the entity understands their record-keeping obligations. Where a business has been given a direction to educate but is liable to a penalty because they completed the course after the due date, consideration should be given to remitting the penalty in full. Where the course has not been completed, the penalty should not be remitted unless exceptional circumstances exist.

Examples

- *An entity that makes no attempt to keep records or deliberately destroys its records will not usually receive any remission of the penalty.*
- *Where the records kept by an entity are such that we cannot verify that the entity is reporting the correct tax-related liability, the record-keeping penalty will not usually be remitted in full; however, a partial remission may be considered. The circumstances of the case and the size and level of sophistication of the entity will be relevant.*
- *We will usually remit the penalty in full where we are satisfied that an entity is reporting the correct tax-related liability, even though record-keeping obligations have not been fully complied with. This reflects the intention of the penalty to support correct reporting of tax-related liabilities.*
- *We will usually remit the penalty in full where the entity has made a reasonable and genuine attempt to comply with its record-keeping obligations, but the records have been lost or destroyed in circumstances outside the entity's control and the entity has reconstructed the records to the best of its ability.*
- *Where an entity is liable to a record-keeping penalty and a shortfall penalty for the same tax obligation, we may remit part or all of the penalty if retaining both penalties would produce an unjust result, such as where the errors were unintentional, and the combined penalties significantly exceed the actual tax shortfall.*

Recording your decision

Record the reasons for your remission (or non-remission) decision on the relevant ATO system.

Step 5 – record the penalty and notify the entity

Record the penalty

Record the penalty amount owing after any remission in the relevant ATO accounting system.

There is no obligation to key into the account any amount of the penalty that we have remitted, only the amount of the penalty after any remission. If the penalty has been fully remitted, there is no penalty, so we do not need to key any penalty on the account.

[15] Capacity to pay and hardship may be dealt with through payment arrangements, compromise, release and under other taxation or insolvency provisions, not through remission of penalties.

Notifying the entity

There are 2 parts to notifying the entity of the penalty[16]:

- explaining why there is a liability to a penalty, and
- issuing a notice of the penalty which includes the due date for the payment of the penalty.

Notice of Penalty and reasons for decision

Where there is a liability, we must give written notice to the entity[17] of:

- their liability to pay the penalty, after any reductions and/or remissions
- the reasons why they are liable to the penalty, and
- the reasons why the penalty has not been remitted or has been remitted only in part.

You must give (or serve) the entity with written notice of its liability to pay the penalty and why the entity is liable to pay the penalty.[18]

The notice must specify the due date of the penalty. The due date must be at least 14 days after the notice is given to the entity.[19]

Where the penalty is not paid by the due date, general interest charge will accrue on the outstanding balance until paid.[20]

The reasons will set out the findings based on relevant facts and refer to the evidence or other material that those findings were based on. That is, we must explain what the decision and the penalty is, why we have made it, the law used and the facts and evidence we considered. We must also address all issues raised by the entity about the penalty.

The law does not specify when the written notice must be given. However, the reasons for decision should be given prior to, or at the same time as, the entity is notified of the penalty. Where this is not possible, they should be provided as soon as possible after issuing a notice of penalty.

The law does not require us to give reasons for the penalty decision where the penalty has been remitted to nil. However, we may wish to notify the entity of the decision in order to positively influence compliance behaviour so the entity can meet its record-keeping obligations in future.

We must record complete reasons for the penalty decisions on the relevant ATO system. This could be through the same document in which the reasons for decision are provided to the entity.

Right of review

An entity may object if they are dissatisfied with our decision:

- to issue a direction to educate, or
- to vary or refuse to vary a direction to educate.[21]

An entity that is dissatisfied with our decision not to remit some or all of the penalty may object to the decision where the penalty not remitted is more than 2 penalty units.[22] If the remaining penalty is not more than 2 penalty units, the entity may seek judicial review of the decision in the Federal Court or Federal Circuit Court.

Where there is no liability to a penalty because of an exception or remission, there is no objection or review right.

4. More information

For more information, see:

- TR 96/7 *Income tax: record keeping – section 262A - general principles*
- MT 2008/1 *Penalty relating to statements: meaning of reasonable care, recklessness and intentional disregard*
- PS LA 2008/14 *Record keeping when using commercial off the shelf software*
- PS LA 2012/5 *Administration of the false or misleading statement penalty – where there is a shortfall amount*
- TD 2011/19 *Tax administration: what is a general administrative practice for the purposes of protection from administrative penalties and interest charges?*
- Prosecution Policy
- Taxpayers' Charter

Date issued	1 February 2005
Date of effect	1 February 2005

[16] Section 298-10.
[17] Sections 298-10 and 298-20.
[18] Section 298-20.
[19] Section 298-15.
[20] Section 298-25.
[21] Section 384-40.
[22] Subsection 298-20(3).

ATTACHMENT A: RECORD-KEEPING PROVISIONS

Type of provision	Act	Legislative reference
General provision – records to be kept: • that record and explain all transactions • in English or readily accessible and easily convertible into English • that enable the entity's liability under the relevant Act or compliance with obligations to be readily ascertained • for 5 years (except if otherwise indicated).	*Income Tax Assessment Act 1936*	Section 262A
	Fringe Benefits Tax Assessment Act 1986	Section 132
	Superannuation Guarantee (Administration) Act 1992	Section 79
	Petroleum Resource Rent Tax Assessment Act 1987	Section 112 (records must be retained for 7 years)
	Taxation Administration Act 1953 Schedule 1	Division 382 Section 396-25 Section 396-125
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
Imputation	*Income Tax Assessment Act 1997*	Subdivision 214-E
Forgiveness of commercial debts	*Income Tax Assessment Act 1997*	Section 245-265
Capital gains tax	*Income Tax Assessment Act 1997*	Division 121
Mineral credits	*Income Tax Assessment Act 1997*	Section 418-180
Thin capitalisation	*Income Tax Assessment Act 1997*	Subdivision 820-L
Coronavirus economic response payments	*Coronavirus Economic Response Package (Payments and Benefits) Act 2020*	Sections 15 and 16
Grants or benefits claims	*Product Grants and Benefits Administration Act 2000*	Sections 26 and 27

Amendment history

Date of amendment	Part	Comment
13 March 2023	Sections 1 and 2, and Steps 2 and 4 of section 3.	New content added for issuing a tax-records education direction under the *Treasury Laws Amendment (2022 Measures No. 2) Act 2022*. Consequential amendments also made to existing content including the introductory section, renumbering paragraphs and remission considerations.
4 February 2021	All	Updated to new LAPS format and style.
9 July 2020	Paragraph 45 and footnote 2	Updated due to change in penalty unit value.
25 June 2020	Paragraph 28	Removed specific dollar values for a penalty unit; included a reference to the source of the penalty unit value and where to locate it.
6 December 2019	Paragraph 28	Updated to reflect current penalty units
22 January 2013	Paragraphs 11 & 28	Revised to reflect change in penalty unit value from 28 December 2012.
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.

References

Legislative references	TAA 1953 8L TAA 1953 8Q TAA 1953 8T TAA 1953 8ZE TAA 1953 Sch1 TAA 1953 Sch1 Div 269 TAA 1953 Sch1 Div 284 TAA 1953 Sch1 288-20 TAA 1953 Sch1 288-25 TAA 1953 Sch1 298-10 TAA 1953 Sch1 298-15 TAA 1953 Sch1 298-20 TAA 1953 Sch1 298-20(3) TAA 1953 Sch1 298-25 TAA 1953 Sch1 Div 382 TAA 1953 Sch1 382-5 TAA 1953 Sch 1 384-12 TAA 1953 Sch 1 384-35 TAA 1953 Sch 1 384-40 TAA 1953 Sch1 396-25 TAA 1953 Sch1 396-125 ITAA 1936 Pt X Div 11 ITAA 1936 102AAZG ITAA 1997 Subdiv 214-E ITAA 1997 245-265 ITAA 1936 262A ITAA 1997 Div 121 ITAA 1997 418-180 ITAA 1997 Subdiv 820-L ITAA 1997 Div 900 FBTAA 1986 Pt X FBTAA 1986 Pt 132 SGAA 1992 79 Coronavirus Economic Response Package (Payments and Benefits) Act 2020 15 Coronavirus Economic Response Package (Payments and Benefits) Act 2020 16 Crimes Act 1914 4AA Distillation Act 1901 Excise Act 1901 Fuel (Penalty Surcharges) Administration Act 1997 Petroleum Resource Rent Tax Assessment Act 1987 112 Product Grants and Benefits Administration Act 2000 26 Product Grants and Benefits Administration Act 2000 27 Spirits Act 1906

Other references	Explanatory Memorandum to the Treasury Laws Amendment (2022 Measures No. 2) Bill 2022 TR 96/7 MT 2008/1 TD 2011/19
Related practice statements	PS LA 2008/14 PS LA 2012/5 PS LA 2021/3

ATO references

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