# *PS LA 2006/1 (Withdrawn) - Remission of additional superannuation guarantee charge imposed under Part 7 of the Superannuation Guarantee (Administration) Act 1992 and administrative penalty imposed under subsection 284-75(3) of Schedule 1 to the Taxation Administration Act 1953 .*

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# Practice Statement Law Administration

**PS LA 2006/1**

**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 tax officers unless doing so creates unintended consequences or where it is considered incorrect. Where this occurs, officers must follow their business line's escalation process.*

**SUBJECT:** **Remission of additional superannuation guarantee charge imposed under Part 7 of the *Superannuation Guarantee (Administration) Act 1992* and administrative penalty imposed under subsection 284-75(3) of Schedule 1 to the *Taxation Administration Act 1953*.**

**PURPOSE:** **This practice statement provides guidelines for tax officers who are considering remitting additional superannuation guarantee charge, in whole or in part, as provided for in subsection 62(3) of the *Superannuation Guarantee (Administration) Act 1992* and remitting administrative penalty under section 298-20 of Schedule 1 to the *Taxation Administration Act 1953*.**

## STATEMENT

### Liability for penalties

1. Part 7 of the *Superannuation Guarantee (Administration) Act 1992* (SGAA) imposes, by way of penalty, an additional superannuation guarantee charge (referred to as 'Part 7 penalty') where the employer fails to provide when and as required:

   - a superannuation guarantee statement (SG statement), or
   - information relevant to assessing the employer's liability to pay the superannuation guarantee charge (SG charge) for a quarter.[1]

2. This penalty effectively applies in two situations. The first situation is late lodgment. The penalty applies when an employer lodges an SG statement which is deemed, by section 35 of the SGAA, to be an assessment of the liability for the SG charge, but the SG statement is lodged after the due date for lodgment.

[1] The SG statement or information may relate to an SG charge arising from a failure to provide superannuation support for an employee or a failure to fulfil the choice of fund obligations for an employee in Part 3A of the SGAA.

3. The second situation is default assessment. The penalty applies when an employer fails to lodge the SG statement and the Commissioner assesses the employer's liability for SG charge under section 36 of the SGAA. The Commissioner may make the assessment based on information obtained from the employer or from other information held by the Commissioner, for example the annual statement provided by an employer for pay as you go withholding purposes.

4. The Part 7 penalty an employer is liable to pay is an amount equal to double the SG charge payable by the employer (subsection 59(1) of the SGAA).

5. Subsection 284-75(3) of Schedule 1 to the *Taxation Administration Act 1953* (TAA) imposes an administrative penalty where the Commissioner determines a tax related liability without the assistance of a return, notice or other document that is both required by a specified time and is necessary to determine the tax related liability (referred to as the 'TAA administrative penalty').

6. The TAA administrative penalty is 75% of the tax-related liability concerned (item 7 of the table in subsection 284-90(1) and subsection 284-90(2) of Schedule 1 to the TAA).

7. It is therefore clear that where the Commissioner makes a default assessment of an employer's liability for SG charge, two different penalties apply.

## Remission of penalties

8. The Commissioner may remit, in full or in part, both the Part 7 penalty and the TAA administrative penalty payable by an employer – see subsection 62(3) of the SGAA and section 298-20 of Schedule 1 to the TAA respectively.

### *Remission of TAA administrative penalty*

9. Tax officers should consider remitting, in full, the TAA administrative penalty for which an employer becomes liable under subsection 284-75(3) of Schedule 1 to the TAA when the Commissioner assesses the employer under section 36 of the SGAA. This is regardless of the extent to which the Part 7 penalty is remitted. The Part 7 penalty, being the penalty specifically provided for by the SGAA, is the appropriate penalty to apply. An officer need not notify an employer of the TAA administrative penalty if it is remitted in full.

### *Remission of Part 7 penalty*

10. Tax officers should use this practice statement as a guide in exercising the Commissioner's discretion to remit any part of the Part 7 penalty to ensure that employers in like circumstances receive like penalties. Officers must obtain information relevant to the remission decision during any audit carried out and fully document in the audit report the relevant evidence and the basis on which any remission decision is made.

11. Any decision concerning the remission of the Part 7 penalty must have regard to the circumstances of the case and the effort made by the employer to comply with

the obligation to self-assess the liability for SG charge. Tax officers should bear in mind that the purpose of imposing penalties is to ensure employees' superannuation entitlements are protected and to encourage future voluntary compliance and continuing co-operation from employers. Genuine attempts to comply will be treated differently from situations where an employer does not make an effort to comply. This approach accords with principles of the taxpayers' charter and with the compliance model.

12. The Part 7 penalty should be remitted to some extent in all but the most extreme situations. This is because the SG regime already has significant disadvantages for employers who fail to comply with their obligations. These include:

- the employer is not entitled to an income tax deduction for the SG charge (while contributions to a complying superannuation fund, if made on time, are deductible)
- the SG charge is calculated on salary and wages (while contributions to a fund, if made on time, are calculated by reference to an employee's notional earnings base which can be less than actual salary or wages because of additional payments made to an employee such as overtime earnings)
- the SG charge includes additional amounts – the administration and nominal interest components, and
- general interest charge (GIC) accrues on the SG charge if it is not paid by the due date.

13. The remission decision should be made following a two step process. The first step involves determining a basic level of remission, having regard to the situations outlined in paragraph 14. The second step involves determining whether there are any other factors, such as those set out in paragraphs 16 and 17, that indicate a lower or higher level of remission is appropriate. Worked examples of how these steps operate in practice are provided in paragraphs 61 – 79 of this Practice Statement.

***Step 1***

14. The following table illustrates the level to which the Part 7 penalty might be remitted in a range of simple situations.

| **In this case:** | **Tax officers should consider remitting the penalty to the equivalent of:^** |
|---|---|
| An employer self-assesses the liability for SG charge after the due date for lodgment of the SG statement but prior to any action being taken by the Commissioner requiring lodgment of the statement or other information* | Nil |
| An employer self-assesses the liability for SG charge after the due date for lodgment of the SG statement in response to action taken by the Commissioner requiring lodgment of the statement or other information | Nil |
| Commissioner assesses the employer's liability for SG charge based on information provided by the employer in response to the Commissioner's request. | 10% of SG charge |
| Commissioner assesses the employer's liability for SG charge in circumstances where the employer has failed to provide information as requested. | 15% of SG charge |

* The reference to action by the Tax Office generally means giving an employer a Superannuation Guarantee Audit Form (SG Audit Form) (see paragraph 41).

^ Note that the level of penalty suggested in this column is calculated as a percentage of the SG charge and not the basic Part 7 penalty which is double the SG charge.

***Step 2***

15. Once the initial level of remission is determined in accordance with the above table, tax officers must have regard to paragraphs 16 and 17 to determine whether a lower or higher level of remission is appropriate.

16. The following factors could lead to a lower level of remission:

- an employer has a history of failing to contribute superannuation for employees, to self-assess the liability for SG charge, or to report the liability for SG charge on time, or
- an employer has taken steps to prevent or obstruct the Commissioner from determining the employer's liability for the SG charge, or has otherwise failed to co-operate with the Commissioner in determining that liability.

17. The existence of one or more of the following factors might justify a higher level of remission:

- a new employer will not generally be penalised in the employer's first year of operation provided the employer made a genuine attempt to comply with the superannuation guarantee obligations (for further details see paragraph 49)
- an established employer with an otherwise good compliance history (a whole of client perspective should be taken)
- the employer made a genuine attempt to comply but made an honest mistake in fulfilling their obligations
- the employer's failure to fulfil the obligations was due to circumstances beyond the employer's control such as sudden illness of the employer or a key employee of the employer, fire, flood or other events that prevented compliance
- the employer has taken steps to mitigate the circumstances that caused the failure to fulfil the obligations (for example, the employer contacted the Tax Office to seek advice as to how to remedy the situation as soon as the failure was detected)
- the employer was misled by information provided by the Tax Office, or
- the employer provided a high level of co-operation to the Tax Office.

**Effect of amending an assessment of SG charge on the Part 7 penalty**

18. Where an SG assessment is amended, any assessment of Part 7 penalty relating to that assessment must also be amended. For example, SG assessments are often amended as a result of an objection decision. Regardless of whether the amendment results in a reduction or increase in an employer's liability for the SG charge, and regardless of whether the employer also objected to the assessment of the Part 7 penalty, tax officers must also amend the assessment of Part 7 penalty.

19. In reconsidering the assessment of the Part 7 penalty, tax officers should also consider relevant facts and circumstances that were not known at the time of making the original assessment of the penalty and any remission decision.

**Scope of this practice statement**

20. The Part 7 penalty is not payable when an employer has lodged an SG statement or otherwise provided information to the Commissioner that is incorrect or from which relevant material has been omitted. In these circumstances, the appropriate penalty will be one arising under Part 4-25 of Schedule 1 to the TAA. Part 4-25 includes, for example, a penalty for false or misleading statements in subsection 284-75(1). The imposition of this penalty will need to be considered where the Commissioner amends the amount already assessed for an employer. The assessment being amended could be an employer's self-assessment or a default assessment made by the Commissioner in relation to information provided by an employer. The administration of these penalties is addressed in other Law Administration Practice Statements.

## EXPLANATION

### Liability for penalties

21. An employer will have a superannuation guarantee shortfall where they do not make sufficient contributions to reduce the charge percentage or they fail to comply with the choice of superannuation fund obligations. Section 5 of the *Superannuation Guarantee Charge Act 1992* (SGCA) imposes an SG charge on any superannuation guarantee shortfall of an employer for a quarter. The SG charge imposed on an employer under the SGCA is payable by the employer under section 16 of the SGAA. However, an employer can avoid the imposition of the charge by making sufficient and appropriate contributions for employees to a complying superannuation fund or Retirement Savings Account (RSA) by the due dates prescribed in the SGAA.[2]

22. An employer who does not make sufficient, or appropriate, superannuation contributions for employees by the prescribed due dates and therefore has a superannuation guarantee shortfall is required to lodge a statement with the Commissioner (section 33 of the SGAA[3] and pay the SG charge. Employers are effectively required to self-assess their liability to the charge as the SG statement is deemed to be an assessment of the employer's SG shortfall (section 35 of the SGAA.

23. The SG charge for a quarter is payable on the:

- 28th day of the second month following the end of the quarter if an employer lodges an SG statement on or before the due date for lodgment (paragraph 46(1)(a) and subsection 46(2) of the SGAA[4]
- date the SG statement is lodged if the SG statement is lodged after the due date (paragraph 46(1)(b) of the SGAA, or
- date the assessment is made for a default assessment (subsection 36(3) of the SGAA.

24. If an employer does not lodge a statement, the Commissioner may take action to establish whether there is a liability for the SG charge. The Commissioner may require the employer to complete an SG Audit Form or to provide a written statement under section 34 of the SGAAor may raise a default assessment under section 36 of the SGAA.

25. Section 59 of the SGAA imposes, by way of penalty, an additional superannuation guarantee charge (the Part 7 penalty) where an employer fails to provide when and as required:

- a superannuation guarantee statement, or

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[2] Since 1 July 2003, the contributions must be made by the 28th day following the end of the quarter. That is, by 28 October, 28 January, 28 April and 28 July. Prior to 1 July 2003, the contributions were required to have been made by 28 July following the end of the financial year.

[3] The statement is required to be lodged by the 28th day of the second month following the end of the quarter. That is, by 28 November, 28 February, 28 May and 28 August. Prior to 1 July 2003, the statement was required to be lodged by 14 August following the end of the financial year. Prior to 1 October 2005, and after 1 July 2003, the statements were required to be lodged by the 14th day of the second month following the end of the quarter.

[4] Prior to 1 July 2003, the due date for payment was 14 August following the end of the financial year. For quarters commencing on or after 1 July 2003 but before 1 October 2005, the due date for payment was the 14th day of the second month following the end of the quarter..

- information relevant to assessing the employer's liability to pay SG charge for a quarter.

26. As discussed in paragraphs 2 and 3, the Part 7 penalty applies in relation to both late lodgments of the SG statement and default assessments of the SG charge made by the Commissioner. In each case, the Commissioner must make an assessment of the Part 7 penalty and notify the employer of the assessed amount – subsection 62(1) of the SGAA. (The notice can form part of another notice issued for the purposes of SGAA – subsection 62(2)).

27. An employer is also liable for an administrative penalty under subsection 284-75(3) of Schedule 1 to the TAA if the employer does not provide an SG statement, or does not provide a document that enables the Commissioner to determine the liability for the SG charge, and as a result the Commissioner raises a default assessment. The penalty is 75% of the SG charge – item 7 of the table in subsection 284-90(1) and subsection 284-90(2) of the TAA. There is nothing that prevents subsection 284-75(3) applying to an employer who is also liable to the Part 7 penalty.

28. The Commissioner must make an assessment of the TAA administrative penalty and must notify the employer of the liability for the penalty if the penalty is not fully remitted (sections 298-30 and 298-10 of Schedule 1 to the TAA).

## Remission of penalties

29. Under subsection 62(3) of the SGAA, the Commissioner can remit all or part of the Part 7 penalty. The TAA administrative penalty can be remitted, in full or in part, under section 298-20 of Schedule 1 to the TAA. In the case of the Part 7 penalty, the remission can be made before or after an assessment – subsection 62(3) of the SGAA.

### *Remission of TAA administrative penalty*

30. Tax officers should consider remitting, in full, the TAA administrative penalty for which an employer becomes liable under subsection 284-75(3) of Schedule 1 to the TAA when the Commissioner assesses the employer under section 36 of the SGAA. This is regardless of the extent to which the Part 7 penalty is remitted. The Part 7 penalty, being the penalty specifically provided for by the SGAA, is the appropriate penalty to apply. An officer need not notify an employer of the TAA administrative penalty if it is remitted in full.

### *Remission of Part 7 penalty*

31. Any decision concerning the remission of the Part 7 penalty must have regard to the circumstances of the case and the effort made by the employer to comply with the obligation to self-assess the liability for SG charge if the necessary contributions have not been made within 28 days of the relevant financial year or quarter. Genuine attempts to comply will be treated differently from situations where an employer does not make an effort to comply. This approach accords with principles of the taxpayers' charter and the compliance model.

32. The Part 7 penalty should be remitted to some extent in all but the most extreme situations such as where it is clear that the employer fully understood the SG obligations and the penalties for failing to comply but chose not to comply with the law. Paragraph 12 explains the reasons for this.

33. The table in paragraph 14 sets out a range of simple situations and levels to which the penalty might be remitted. The factors set out in paragraphs 16 and 17 need to be considered to determine whether a higher or lower level of remission is warranted.

34. Where an employer's liability for SG charge is determined by audit, or an SG statement is lodged as a result of the commencement of an audit, tax officers must document all the relevant facts in the audit report and clearly record the basis for determining the level of remission. When determining the level of remission officers should bear in mind that the purpose of imposing penalties is to ensure employees' superannuation entitlements are protected and to encourage future voluntary compliance and continuing co-operation from employers. Officers should also seek to ensure that those employers who fulfil their obligations, or make a genuine attempt to do so, are treated differently from those who do not.

## Objection rights

35. Employers have the right to object to an assessment of a Part 7 penalty (section 42 of the SGAA. Although there is no separate right of objection against the remission of the Part 7 penalty, we treat an objection against the penalty assessment as including the remission decision.

36. Employers have a right to object to an assessment of the TAA administrative penalty (subsection 298-30(2) of Schedule 1 to the TAA). There is also a separate right to object to a decision to remit that penalty if the amount payable after remission exceeds two penalty units (subsection 298-20(3) of Schedule 1 to the TAA).

## Effect of prosecution for failing to provide a form or information

37. It is an offence to refuse or fail to provide a form or information to the Commissioner as required (section 8C of the TAA) so a failure to lodge an SG statement may be prosecuted. However, the Tax Office will not generally 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's policy on prosecution is fully explained in the *ATO Prosecution Policy*.

38. Further, where a prosecution is instituted against an employer, the employer cannot be made liable to a penalty in relation to the same act or omission that is the subject of the prosecution (section 8ZE of the TAA). While the SG charge will remain payable by the employer, no Part 7 penalty nor TAA administrative penalty will be payable.

**Explanation of factors relevant to applying step 1**

***Due date for lodgment***

39. Employers who have a superannuation guarantee shortfall for a quarter are responsible for lodging an SG statement by the due date set out in subsection 33(1) of the SGAA. An employer who is unable to lodge on time is expected to contact the Tax Office prior to the due date for lodgment to discuss the possibility of obtaining a later lodgment date. The Commissioner may allow an employer to lodge the SG statement on a later date (subsection 33(1A) of the SGAA.

40. Where an employer has obtained an extension of time to lodge, no Part 7 penalty is payable if the statement is lodged before the extended date. However, if the employer fails to lodge by the extended due date, Part 7 penalty may be payable and, if so, its remission must be considered.

***What is meant by a reference to 'Audit/Tax office action'***

41. The simple situations outlined in the table in paragraph 14 refer to action taken by the Commissioner. Where an employer has not provided an SG statement and the Commissioner becomes aware that the employer may potentially be liable to the SG charge, the Commissioner requires the employer to complete an SG Audit Form or an SG statement using the power in section 34 of the SGAA. The date when the employer receives the SG Audit Form or the notice to provide a statement is considered to be the commencement of an audit.

***Late lodgment prior to Tax Office action***

42. Where an employer has lodged an SG statement after the due date for lodgment but prior to any audit action being taken by the Tax Office, the Part 7 penalty should be remitted.

43. As a general principle, the Part 7 penalty may be remitted in full in these cases. However, this level of remission should be decreased if the employer's compliance history (as discussed below in paragraphs 50 to 53) is poor. For example, remission to 5% of the SG charge might be appropriate where the employer has previously lodged late SG statements.

***Lodgment after Tax Office action***

44. Even where the SG statement is lodged after action has been taken by the Tax Office, the penalty should also be remitted.

45. As a general principle, the Part 7 penalty may be remitted in full. This level of remission should be decreased if the employer's compliance history (as discussed below in paragraphs 50 to 53) is poor. In cases such as these, case officers are required to fully document their decision to remit or otherwise the Part 7 penalty.

***Default assessment – information provided by employer***

46. In cases where the Commissioner makes a default assessment of an employer's liability to the SG charge the employer should not be allowed the same level of remission as those employers who have lodged an SG statement.

47. In cases where the Commissioner assesses an employer based on information in the employer's SG Audit Form the Part 7 penalty can be remitted to the equivalent of 10% of the SG charge. This level of remission can be increased or decreased according to the individual circumstances of the case. In cases such as these, case officers are required to fully document their decision to remit or otherwise the Part 7 penalty.

***Default assessment – no information provided by employer***

48. In cases where the Commissioner's default assessment is made in the absence of co-operation from an employer, the Part 7 penalty can be remitted to the equivalent of 15% of the SG charge. This level of remission can be increased or decreased according to the individual circumstances of the case. In cases such as these, case officers are required to fully document their decision to remit or otherwise Part 7 penalty.

**Explanation of factors relevant to applying step 2**

***New Employers***

49. A new employer will not generally be penalised in the first year of operation provided there has been a genuine attempt to comply with tax obligations. This concession will not apply to an employer who has previously been involved in business operations or hired employees, or if the employer has used the services of a tax agent and:

- has not followed the agent's advice, or
- the agent has failed to exercise reasonable care.

***Compliance history***

50. Paragraph 16 states that certain factors may lead to a lower level of remission. The compliance model requires tax officers to take account of an employer's previous compliance history both generally and specifically in relation to SG matters when considering the quantum of remission of the Part 7 penalty. An employer with a poor compliance history would not generally be entitled to the same level of remission of penalty as an employer whose compliance has previously been good.

51. An employer is considered to have a poor compliance history if the employer has not made contributions to a complying fund or RSA at the appropriate rate, or has not contributed to an employee's chosen fund, by the prescribed due dates in an earlier period and for that earlier period either:

- failed to lodge a statement by the time set out in the legislation, or
- the Commissioner sought information from the employer which, when provided, led to the establishment of an SG liability and the issue of an SG assessment.

52. However, for the purposes of considering remission of the Part 7 penalty where an audit covers several quarters or income years, it is the employer's compliance history for periods earlier than those covered by the audit that are relevant.

53. The fact the whole of the Part 7 penalty may have been remitted in full in an earlier period does not remove the fact that the employer has a previous history. Where there is a previous history, tax officers should consider whether it is appropriate to decrease the level of remission by 5% in respect of each previous history event relevant to SG. However, it will not always be appropriate to reduce the level of remission. For example, it might not be appropriate in a case where the employer's failure to lodge the SG statement was due to circumstances beyond the employer's control even if the employer had deliberately not provided superannuation support in an earlier period.

### *Obstruction*

54. Paragraph 16 also suggests that there should be a lower level of remission where an employer prevents or obstructs the Commissioner from determining the employer's liability for the SG charge. An employer is expected to provide a reasonable level of co-operation with the Tax Office. An employer is expected to answer relevant and reasonable questions truthfully and to the best of the employer's ability and to provide information or allow access to records in a timely way. Reasonable co-operation does not require the employer to agree with a tax officer's views.

55. In cases of obstruction, the level of remission may be decreased by 5 to 10% depending on the circumstances of the case. Examples of how this may apply in practice are provided in paragraphs 72 – 75.

## Explanation of other matters

### *Other penalties*

56. The Part 7 penalty is not payable when an employer lodges an SG statement that contains incorrect information or from which relevant material has been omitted. In these circumstances, the appropriate penalty falls for consideration under one of the provisions in the TAA – such as the penalty for false or misleading statements.

57. The false or misleading statement penalty will be payable where an employer has provided incorrect information in, or omitted material from, an SG statement that has been deemed to be the employer's assessment of the SG charge. The penalty may also arise in relation to information in, or omitted from, the employer's SG Audit Form. For example, the false or misleading statement penalty would be payable in relation to an amended assessment made because an employer understated an employee's earnings base. An example of this situation is provided in paragraphs 76 – 77.

### *Amending the Part 7 penalty assessment*

58. If an SG assessment is amended to decrease or increase the SG charge payable by the employer, the Commissioner has the power to amend the Part 7 penalty assessment. Section 37 of the SGAA states the Commissioner may at any time alter any assessment. 'Assessment' is defined in subsection 6(1) of the SGAA and includes the ascertainment of additional SG charge payable under Part 7.

59. Section 59 of the SGAA establishes that the amount of the Part 7 penalty is based on the amount of the SG charge payable by the employer for the quarter. Accordingly, if the amount of the SG charge alters as a result of an amended assessment, the amount of the Part 7 penalty must also be amended to reflect the amended SG charge upon which it is based. An example of this is provided in paragraphs 78 – 79.

### *Amending the TAA administrative penalty*

60. So much of any administrative penalty imposed under subsection 284-75(3) of Schedule 1 to the TAA that has not been remitted will also need to be amended.

## Examples

### *Late lodgment of SG statement*

*Example 1 – Special circumstances and failure immediately mitigated*

61. An employer who has a shortfall amount for the quarter ending 31 March 2005 does not lodge the required SG statement by 14 May 2005. In June the employer's own internal checks detect a failure to provide superannuation support for two of the employer's 20 employees. The failure related to two new staff members and was a one-off error due to the temporary absence of a key staff member. The employer's overall compliance and compliance with SG in particular have been good. The employer lodges an SG statement that same month and pays the SG charge owing.

62. The Part 7 penalty can be remitted in full under step 1. The employer has a good compliance history. There is no basis on which to decrease the level of remission under step 2.

*Example 2 – Recurring late lodgment of SG statement*

63. An employer lodges a late SG statement in two consecutive quarters. The Tax Office contacts the employer to ensure it understands the obligation to provide superannuation support for employees and the obligation to lodge the SG statement on time. After contact from the Tax Office, a further two SG statements are lodged late.

64. The Tax Office again contacts the employer. The case officer finds that the employer has not altered the processes used to ensure that an appropriate level of superannuation support is provided for employees nor taken steps to improve the timeliness of lodgment. The case officer decides that although the Part 7 penalty can be remitted in full under step 1, the recurring failure to comply with SG obligations justifies a decrease in the level of remission. Part 7 penalty of 5% of the SG charge is assessed.

***Tax Office Makes Default Assessment***

*Example 3 – Special circumstances, failure due to factors beyond employer's control*

65. An employer who has a shortfall amount for the quarter ending 31 March 2005 does not lodge the required SG statement by 14 May 2005. The shortfall relates to some, but not all, of the employees. In September 2005, the Commissioner sends the employer a SG Audit Form. In response to the SG Audit Form, the employer admits the failure to provide superannuation support for several employees.

66. The employer explains that it failed to provide superannuation support for the affected employees because a debtor had failed to pay an account on time. This failure caused the employer serious cash-flow problems. The employer determined that it could not meet all employee obligations, and decided not to pay the relevant superannuation contributions. The cash-flow problems are on-going, as the employer has had to resort to legal action to secure payment of the debt. The employer explains that it did not lodge the SG statement because it knew it couldn't pay the SG charge. The employer's overall compliance and compliance with SG in particular is otherwise good.

67. The case officer determines that the Part 7 penalty could be remitted to 10% under step 1. The officer is satisfied that having regard to the employer's good compliance history and the fact that the failure to provide superannuation support was due to circumstances beyond the employer's control, the Part 7 penalty could be remitted further. However, the case officer determines that the Part 7 penalty should only be remitted to 5% because the employer should still have lodged the SG statement by the due date for lodgment and sought an extension of time to pay the SG charge or establish an appropriate payment arrangement.

*Example 4 – Misunderstanding of obligation to pay SG charge and lodge SG statement*

68. An employer makes superannuation contributions for the September 2005 quarter to a superannuation fund on 15 December 2005. These contributions were due by 28 October 2005. The fund accepts the contributions even though late. The Tax Office sends the employer an SG Audit Form. The employer returns the SG Audit Form disclosing these details. The case officer raises the relevant SG charge assessment.

69. The case officer determines that the Part 7 penalty could be remitted to 10% under step 1. The case officer finds that the employer made an attempt to comply with the SG obligations but did not fully understand what was required to be done. The officer finds that the employer genuinely believed that no charge was payable and no SG statement required because the fund accepted the late contributions. The case officer decides to remit the penalty so that the Part 7 penalty assessed is equal to 5% of the SG charge.

*Example 5 – No attempt to comply, assessment based on SG audit form*

70. An employer who has a shortfall amount for the quarter ending 31 March 2005 does not lodge the required SG statement by 14 May 2005. In September 2005, the Commissioner sends the employer a SG Audit Form. The employer's response states that no superannuation contributions were made for any employee. The employer's SG compliance history has not previously been reviewed.

71. The case officer determines that the Part 7 penalty could be remitted to 10% under step 1. Following further questioning of the employer, the case officer establishes that the employer was generally aware of an obligation to provide superannuation support for employees but had made no attempt to determine exactly what needed to be done to comply. As the employer made no attempt to comply with the SG regime but has no previous history of failing to comply, the case officer determines that a lower or higher level of remission is not appropriate.

*Example 6 – No attempt to comply, SG audit form response only after repeated contact*

72. An employer does not return an SG Audit Form by the due date. The case officer contacts the employer who explains that a response has not been prepared because of the pressure of work. After asking how much more time the employer needs to respond, the case officer agrees to allow the employer a further 14 days to do so. The employer fails to return the SG Audit Form within that extended period. The case officer has to contact the employer a number of times before the employer returns the form. The SG Audit Form establishes that the employer is liable for SG charge for all 3 of the employer's employees for all the period covered by the form.

73. The case officer determines that the Part 7 penalty could be remitted to 10% under step 1. Following further questioning of the employer, the case officer establishes that the employer was aware of the obligation to provide superannuation support for employees. The employer stated that there were too many things to do to worry about his employees' superannuation. The case officer decides that the employer made no attempt to comply with the SG regime and sought to avoid detection by delaying completion of the audit. The employer has not detailed any special circumstances that explain the failure to fulfil the SG obligations. The case officer remits the Part 7 penalty to 15% of the SG charge, being 10% of charge because the Commissioner was required to raise a default assessment of the charge and an additional 5% to reflect the employer's lack of co-operation during the audit.

*Example 7 – No attempt to comply, no response to SG audit form*

74. An employer does not return an SG Audit Form by the due date. The case officer contacts the employer who explains that a response has not been prepared because of the pressure of work. After asking how much more time the employer needs to respond, the case officer agrees to allow the employer a further 14 days to do so. The employer fails to return the SG Audit Form within that extended period and does not respond to further contact by the case officer. The case officer raises a default assessment of the employer's SG charge based on information from other sources for all 3 of the employer's employees for all the period covered by the form.

75. The case officer determines that the Part 7 penalty could be remitted to 15% under step 1. The case officer also determines that the employer made no attempt to comply with the SG regime and sought to avoid liability for the charge by refusing to respond to the officer's requests. The case officer remits the Part 7 penalty to 20% of the SG charge, being 15% of the charge because the Commissioner was required to raise a default assessment in the absence of information provided by the employer and an additional 5% to reflect the employer's lack of co-operation during the audit.

### *Application of administrative penalty for false or misleading statement*

*Example 8 – SG statement omitted individual shortfall for certain employees*

76. An employer did not provide superannuation support for three existing employees by the due date and subsequently lodged the necessary SG statement covering these employees. However, a subsequent audit undertaken by the Tax Office reveals that two other employees also did not receive any superannuation support for the same quarter.

77. No Part 7 penalty is payable in this situation as the employer lodged an SG statement for the relevant quarter. However, the case officer will have to consider the application of the false or misleading statement penalty in subsection 284-75(1) of Schedule 1 to the TAA.

***Objections***

*Example 9 – SG liability altered*

78. The Commissioner sends an SG Audit Form to the employer requiring a response within 21 days. The employer does not respond to the form and fails to respond to telephone calls from the case officer. The case officer consequently raises a default assessment using information gathered from other sources. The SG charge on the default assessment is $3,000. The case officer assesses the Part 7 penalty and remits it to $600 (that is, 20% of the SG charge).

79. The employer objects to the assessments of the SG charge and the Part 7 penalty. The information provided with the objection reveals that the Commissioner's assessment is excessive. However, the employer's objection does not provide further information concerning remission of the Part 7 penalty. The case officer amends the assessment to reflect a reduced SG charge of $2,000. The case officer also amends the Part 7 penalty assessment to $400 (that is, 20% of the amended SG charge of $2,000).

**Amendment history**

| Date of amendment | Part | Comment |
|---|---|---|
| 20 May 2010 | Contact details | Updated. |
| 2 September 2009 | Contact details | Updated. |
| 15 April 2008 | Contact details | Updated. |
| 30 April 2007 | Paragraph 3 | Change reference to section 34 of the SGAA to section 36 of the SGAA. |
| | Paragraph 14 | Remove references to section 34 of the SGAA |
| | Paragraph 41 | Update reference to section 34 of the SGAA; remove reference to section 33 of the SGAA |
| | Contact details | Updated |

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|---|---|
| Subject references | administrative penalties, superannuation guarantee, superannuation guarantee charge, remission of penalties |
| Legislative references | SGAA 6(1)<br>SGAA 33(1) and (1A)<br>SGAA 34<br>SGAA 35<br>SGAA 36<br>SGAA 37<br>SGAA 42<br>SGAA 46<br>SGAA Part 7<br>SGAA 59(1)<br>SGAA 62(1)<br>SGAA 62(2)<br>SGAA 62(3)<br>SGCA 5<br>TAA 1953 8C<br>TAA 1953 8ZE<br>TAA 1953 Sch 1 284-75(1) and (3)<br>TAA 1953 Sch 1 284-90(1) and (2)<br>TAA 1953 Sch 1 298-10<br>TAA 1953 Sch 1 298-20<br>TAA 1953 Sch 1 298-30 |
| Related public rulings | |
| Related practice statements | |
| Case references | |
| File references | 05/7624; 05/16805 |
| Date issued | 22 February 2006 |
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